DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-11328

Title	Willie Gene Davis, Petitioner v. United States
Docketed	June 15, 2010
Lower Ct.	United States Court of Appeals for the Eleventh Circuit
Case Nos.	(08-16654)
Decision Date	March 11, 2010

Questions Presented

---Date---	--------Proceedings and Orders----------
Jun 8 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 15, 2010)
Jul 8 2010	Order extending time to file response to petition to and including August 16, 2010.
Aug 10 2010	Order further extending time to file response to petition to and including September 15, 2010.
Sep 15 2010	Brief of respondent United States in opposition filed.
Oct 7 2010	DISTRIBUTED for Conference of October 29, 2010.
Nov 1 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 23 2010	Brief amicus curiae of Wayne County, Michigan in support of the respondent filed.
Dec 2 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Dec 16 2010	Joint appendix filed. (Statement of costs filed)
Dec 16 2010	Brief of petitioner Willie Gene Davis filed.
Dec 21 2010	The time to file respondent's brief on the merits is extended to and including February 11, 2011.
Dec 23 2010	SET FOR ARGUMENT Monday, March 21, 2011.
Dec 23 2010	Brief amicus curiae of National Association of Federal Defenders filed.
Jan 14 2011	CIRCULATED.
Feb 8 2011	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Feb 11 2011	Brief of respondent United States filed. (Distributed)
Feb 18 2011	Brief amici curiae of Maryland, et al. filed. (Distributed)
Feb 18 2011	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 4 2011	Reply of petitioner Willie Gene Davis filed. (Distributed)

Mar 4 2011	Motion to appoint counsel filed by petitioner Willie Gene Davis
Mar 16 2011	DISTRIBUTED for Conference of April 1, 2011
Mar 21 2011	Argued. For petitioner: Orin S. Kerr, Washington, D. C. For respondent: Micheal R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.
Apr 4 2011	Motion to appoint counsel filed by petitioner GRANTED. William W. Whatley, Esquire, of Montgomery, Alabama, is appointed to serve as counsel for the petitioner in this case.

PETITION FOR WRIT OF CERTIORARI

No. 0911328

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JUN 08 2010
OFFICE OF THE CLERK

WILLIE GENE DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

COMES NOW, Your Petitioner, Willie Gene Davis, by and through his Attorney of Record, William W. Whatley, Jr., and moves this Honorable Court to grant him this Motion for Leave to Proceed *In Forma Pauperis*, pursuant to Rule 39, Rules of the Supreme Court. As grounds therefore, Petitioner Davis avers to this Honorable Court that he has significant, meritorious, constitutional claims to

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present to this Court and he is without sufficient funds to pay the costs of this case. In further support of this motion, Petitioner Davis avers that counsel of record was appointed by the United States Court of Appeals for the Eleventh Circuit pursuant to the Criminal Justice Act of 1964, 18 U.S.C. §3006A, in February, 2009. Petitioner Davis had previously been declared indigent by the United States District Court for the Middle District of Alabama before his conviction.

WHEREFORE, PREMISES CONSIDERED, Petitioner Davis, by and through counsel, moves this Honorable Court to grant this Motion to Proceed *In Forma Pauperis* in his Petition for Writ of Certiorari to this Court.

Respectfully submitted this the 8th day of June, 2010.

William W. Whatley, Jr.
Counsel for Petitioner Davis
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon:

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Matthew W. Shepherd
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Montgomery, AL 36101-0197

and, by placing a copy of the same in the United States mail, postage prepaid,

addressed as above, on this the 8th day of June, 2010.

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No. 09-11328

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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WILLIE GENE DAVIS,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In United States v. Leon, 468 U.S. 897 (1984), this Court created a good-faith exception to the exclusionary rule of the Fourth Amendment. The Court has expanded the good-faith exception over time, most recently in Herring v. United States, ___ U.S. ___, 129 S.Ct. 695 (2009). Petitioner asks the Court to resolve a deepening split in the lower courts over whether the good-faith exception applies to changing interpretations of law. The question presented is this:

> "Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent at the time of the search that is subsequently ruled unconstitutional."

PARTIES TO THE PROCEEDING

Petitioner is Willie Gene Davis, an individual. Respondent is the United States.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Mr. Willie Gene Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition. United States v. Davis, ___ F.3d ___ (11th Cir. 2010). The United States District Court for the Middle District of Alabama overruled Petitioner Davis' objection to the Magistrate Judge's decision to deny Petitioner Davis' Motion to Suppress the search of the vehicle.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit affirmed Petitioner Davis' conviction and upheld the denial of the motion to suppress by the United States District Court for the Middle District of Alabama by opinion dated March 11, 2010. United States v. Davis, ___ F.3d ___ (11th Cir. 2010). A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner Willie Gene Davis (Davis) was charged in the United States District Court for the Middle District of Alabama in a one count indictment with felon in possession of a firearm. (Case No. 2:07CR248-WKW) The case against Davis went to trial and on May 13, 2008, the jury returned a verdict finding Davis guilty of the offense as indicted. Davis was sentenced on November 6, 2008 to a term of imprisonment of 220 months. Davis' direct appeal to United States Court of Appeals for the Eleventh Circuit was decided on March 11, 2010, with that court determining that Davis' constitutional rights were violated by the search but refusing to apply the exclusionary rule. (Appendix A) This Petition for Certiorari ensued.

SUMMARY OF ARGUMENT

The District Court below should have granted Davis' Motion to Suppress since the search of the vehicle was unreasonable under the Fourth Amendment to the United States Constitution. This Court's recent decision in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) finding that law enforcement is not authorized to conduct a warrantless vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle controls Davis' case. This Court's previous decisions

construing New York v. Belton, 453 U.S. 454 (1981) on this specific issue guided the District Court in making the decision to deny Davis' motion to suppress.

Gant expressly states that "Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." Gant, 173 L.Ed.2 at 499. The facts in this case demonstrate that Davis was arrested for providing a false name to a law enforcement officer and after he was placed in handcuffs and secured in the back of a patrol unit[1], the officer returned to the vehicle in which Davis had been a passenger and searched a jacket that Davis had been wearing while in the vehicle. These acts demonstrate that this constituted an unreasonable search and the evidence should have been suppressed.

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[1]The driver of the vehicle had already been arrested and placed in another squad car leaving no one with access to the vehicle other than law enforcement. Davis, at 3.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the deepening split among the lower courts and this Court about whether the good-fath exception applies when a search that was considered lawful at the time it occurred is later ruled unconstitutional.

This issue concerning application of Fourth Amendment law arises every time a court issues a ruling in a criminal defendant's favor that departs unexpectedly from earlier decisions. Defendants with similar cases still pending on direct appeal attempt to raise the new ruling in support of suppression of the evidence in their cases. The question is, does the new case apply in full force so that the evidence is suppressed or does the good-faith exception to the exclusionary rule apply so that the evidence is admitted?

A deepening circuit split has emerged to answer this particular question. The Eleventh Circuit, the Fifth Circuit and the Tenth Circuit have held that the good-faith exception applies in such settings. *See* United States v. Davis, ___ F.3d ___ (11th Cir. 2010); United States v. Jackson, 825 F.3d 853 (5th Cir. 1987); United States v. McCane, 573 F.3d 1037 (10th Cir. 2009). On the other hand the Ninth Circuit has held that the good-faith exception does not apply. *See* United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009), *reh'g and reh'g en banc denied*, 598 F.3d 1095 (9th Cir. 2010). The Seventh Circuit and the First Circuit have taken a

position that applies the good-faith exception in some circumstances, but not others. *See* United States v. Real Property Located at 15324 County Highway E., 332 F.3d 1070 (7th Cir. 2003); United States v. Brunette, 256 F.3d 14, 19 (1st Cir. 2001).

Additionally, two state Supreme Courts have held that the good-faith exception applies in such settings. *See* State v. Ward, 604 N.W.2d 517 (Wis. 2000); State v. Herrick, 588 N.W.2d 847 (N.D. 1999). One state Supreme Court has recently held that the good-faith exception does not apply. *See* People v. McCarty, No. 09-SA-161, Slip op. (Colo., May 10, 2010). Very recently the District of Columbia Court of Appeals rejected a good-faith exception to the exclusionary rule based on Gant. United States v. Debruhl, No. 09-CO-1208, slip op. (D.C. April 22, 2010).

This Court should grant the petition to resolve the disagreement in the lower courts.

I. A DEEPENING CIRCUIT SPLIT EXISTS ON WHETHER THE GOOD-FAITH EXCEPTION EXTENDS TO RELIANCE ON OVERTURNED LAW: THREE CIRCUITS CONCLUDE THAT IT DOES; ONE CIRCUIT CONCLUDES THAT IT DOES NOT; AND TWO CIRCUITS CONCLUDE IT DEPENDS ON WHETHER A WARRANT WAS OBTAINED.

(a) Good-Faith Exception Recognized: Eleventh Circuit, Tenth Circuit, Fifth Circuit and two state Supreme Courts

The Eleventh Circuit adopted the good-faith exception in the decision below, refusing to apply the exclusionary rule and allowing the admission of evidence obtained in reasonable reliance on circuit precedents. United States v. Davis, ___ F.3d ___ (11th Cir. 2010). After determining that "There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in Gant," Davis, at 6, the Eleventh Circuit ruled that the search was objectively reasonable under "then-binding precedent." Davis, at 17.

Addressing the same issue, the Tenth Circuit stated "when law enforcement officers act in objectively reasonable reliance upon the settled law of a United States Court of Appeals" that is subsequently recognized as "unconstitutional" by a United States Supreme Court decision, the good-faith exception applies. United States v. McCane, 573 F.3d 1037, 1045 (10th Cir. 2009). The Fifth Circuit in

United States v. Jackson, 825 F.3d 853 (5th Cir. 1987) overturned Fifth Circuit precedent that had previously allowed warrantless searches at a checkpoint under the border search exception to the Fourth Amendment. The *en banc* decision in Jackson held that the checkpoint searches were unconstitutional, but the court then applied the good-faith exception and affirmed the convictions based on the officers' reasonable reliance on Fifth Circuit law. 573 F.3d at 866. *See also* United States v. Morgan, 835 F.2d 79, 80-81 (5th Cir. 1987)(applying good-faith exception for changed interpretations of law recognized by Jackson).

This position has been adopted by two state supreme courts. *See* State v. Ward, 604 N.W.2d 517 (Wis. 2000); State v. Herrick, 588 N.W.2d 847 (N.D. 1999). These decisions involved "no-knock" searches that had been allowed by state court precedents authorizing no-knock warrants in all felony drug investigations prior to this Court's decision in Richards v. Wisconsin, 520 U.S. 385 (1997).

Following the Richards decision, defendants attempted to invoke the exclusionary rule in cases that could not satisfy the case-by-case standard. The Supreme Court of Wisconsin and the Supreme Court of North Dakota each held that the good-faith exception applied to searches before Richards in light of state court precedents allowing no-knock searches. *See* Ward, 604 N.W.2d at 749-50; Herrick, 588 N.W.2d at 850-51.

(b) No Good-Faith Exception: Ninth Circuit, and one state Supreme Court and the District of Columbia Court of Appeals

Taking the opposite position, the Ninth Circuit has flatly rejected the good-faith exception for changing law in a case with facts nearly identical to those in this petition. See United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009), *reh'g denied*, 598 F.3d 1095 (9th Cir. 2010). Just as in this petition, Gonzalez involved a search that complied with circuit precedent when it occurred but was later ruled unlawful by this Court's decision in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Gonzalez was arrested and placed in the back of the squad car at a traffic stop. A search of the car incident to his arrest discovered a pistol in the glovebox. The Ninth Circuit initially affirmed the denial of the motion to suppress based on New York v. Belton, 453 U.S. 454 (1981). Following this Court's decision in Gant, the Gonzalez case was remanded to the Ninth Circuit which held that the good-faith exception did not apply and reversed the conviction.

The Ninth Circuit reasoned that this Court's decisions in United States v. Johnson, 457 U.S. 537 (1982) and Griffith v. Kentucky, 479 U.S. 314 (1987), are precedent for the decision not to apply a good-faith exception. "To hold that Gant may not be fully applied here, as the Government urges, would conflict with the Court's retroactivity precedents." Gonzalez, 578 F.3d at 1132. The Ninth Circuit

notes this Court's position:

> We conclude, however, that this case should be controlled by long-standing precedent governing the applicability of a new rule announced by the Supreme Court while a case is on direct review. This Court has held that a "decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." United States v. Johnson, 457 U.S. 537, 562 (1982) and Griffith v. Kentucky, 479 U.S. 314, 328 (1987)(finding that even decisions constituting a "clear break" with past precedent have retroactive application). This precedent requires us to apply Gant to the current case without the overlay of an application of the good-faith exception.

Gonzalez, 578 F.3d at 1132.

On rehearing, the Ninth Circuit further noted: "When the Supreme Court clarifies the boundaries of a constitutional search in one case, in fairness, that clarification must be consistently applied to all cases that are not yet final." Gonzalez, 598 F.3d at 1097. In conclusion the majority opinion stated: "The panel's decision is compelled by the Supreme Court's retroactivity precedents and dictated by Gant." Gonzalez, 598 F.3d at 1100.

Recently this same position has been adopted by Colorado Supreme Court and the District of Columbia Court of Appeals. In People v. McCarthy, No. 09-SA-161, slip op. (Colo., May 10, 2010) after referencing Gant, the Colorado Supreme Court affirmed the lower court's suppression of evidence found during a traffic stop in which there was "no suggestion that the defendant in this case was capable of accessing his vehicle at the time of the search." McCathy, at 13. In

response to the prosecution's argument that Gant should not be applied retroactively, the Colorado Supreme Court stated that they were "reluctant to expand the good-faith exception to the Supreme Court's exclusionary rule beyond the limits set by that Court itself." McCathy, at 13.

The Colorado Supreme Court noted the United States v. Johnson, and Griffith v. Kentucky decisions as support for the position that Gant would apply to all cases that were not final when Gant was announced. Although noting that this Court has not recognized a good-faith exception to the exclusionary rule for "reliance on prior holdings of its own from which it has subsequently departed, much less for reliance on the erroneous interpretations of its prior holdings by lower courts" the Colorado Supreme Court aligned with the Ninth Circuit's decision in Gonzalez in the end. McCathy, at 9.

In United States v. Debruhl, No. 09-CO-1208, slip op. (D.C. April 22, 2010), the District of Columbia Court of Appeals, in another remarkably similar traffic stop to Petitioner Davis' case, in which all the occupants of the vehicle had been removed and secured before the search began, addressed application of Gant. After noting that the officer's reliance on Belton as basis for the warrantless search, the District of Columbia Court of Appeals rejected a good-faith exception to the exclusionary rule. Debruhl, at 3.

With each passing day more of the lower courts will be addressing the issue

of the retroactive application of Gant to cases that were not yet final. The state courts are already addressing these issues and attempting to deal with the question of retroactive application of Gant.[2] The circuit courts of appeal have noted that there is a split on this issue. "We are not the first court of appeals to consider this question, but the other circuits have split on the issue." Davis, at 7. Writing in dissent in the decision to deny rehearing in Gonzalez, Judge Bea notes: ". . . the panel has set the stage for the Supreme Court to review the scope of the exclusionary rule in light of the circuit split we have now created." Gonzalez, 598 F.3d at 1103. (Bea, J., dissenting)

(c) No Good-Faith Exception Unless a Warrant Was Obtained: Seventh Circuit and First Circuit.

At least two circuits have taken the third approach that depends on whether law enforcement later obtained a warrant. If police seek admission of evidence that was obtained directly from a warrantless search later deemed unconstitutional by subsequent case developments, the good-faith exception does not apply. Alternatively, the good-faith exception would apply if law enforcement use evidence from the unlawful warrantless search to create probable cause for a

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[2]Although not a state supreme court decision, the North Carolina Court of Appeals has very recently addressed this issue and found: "It is clear that Gant applies retroactively to this case..." State v. Johnson, Slip op. at 2 (N.C. App. June 1, 2010).

search warrant.

The Seventh Circuit adopted this approach in United States v. Real Property Located at 15324 County Highway E., 332 F.3d 1070 (7th Cir. 2003). After scanning a suspect's home with a thermal imaging device without a warrant to determine if he was growing marijuana inside, the scan was used to establish probable cause for a warrant to search the home, and the police obtained a warrant for the search. The search pursuant to the warrant led to the discovery of narcotics. Based on Seventh Circuit precedent which held that use of a thermal imaging device was not a search, the Seventh Circuit initially affirmed the forfeiture against at Fourth Amendment attack. United States v. Real Property Located at 15324 County Highway E., 219 F.3d 602 (7th Cir. 2000). Following this Court's decision in Kyllo v. United States, 533 U.S. 27 (2001) holding that use of a thermal imaging device was a search, this Court vacated and remanded the Seventh Circuit's decision. On remand the Seventh Circuit held that the good-faith exception applies only if police obtain a warrant following a warrantless search later deemed unconstitutional. United States v. Real Property Located at 15324 County Highway E., 332 F.3d at 1075-1076.

This mixed approach was justified according to the Seventh Circuit on the ground that if a magistrate judge evaluates the conduct of the officers and approves the search warrant, there is no misconduct by the officers that would

justify suppression. A magistrate was determined to be in "a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan" than the officers. United States v. Real Property Located at 15324 County Highway E., 332 F.3d at 1075.

In the First Circuit, when the government has obtained a warrant the good-faith exception has applied by considering the state of case law at the time the search took place. United States v. Brunette, 256 F.3d 14, 19 (1st Cir.2001)("the uncertain state of the law at the time made reliance on the warrant objectively reasonable" even though the warrant was held unlawful in precedents after the search occurred) Alternatively, the First Circuit has rejected the application of a good-faith exception when the government has not obtained a warrant. United States v. Curzi, 867 F.2d 36, 44 (1st Cir. 1989).

II. THE DECISION OF THE ELEVENTH CIRCUIT COURT CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari should be granted because the decision of the Eleventh Circuit Court of Appeals in Petitioner Davis' case conflicts with precedents of this Court. As noted by the Colorado Supreme Court in McCathy, this Court has not recognized a good-faith exception to the exclusionary rule for "reliance on prior

holdings of its own from which it has subsequently departed, much less for reliance on the erroneous interpretations of its prior holdings by lower courts." McCathy, at 9. This Court has addressed whether good-faith reliance on overruled Fourth Amendment caselaw provides a basis to affirm convictions obtained in violation of the Fourth Amendment.

In United States v. Johnson, 457 U.S. 537 (1982) the question was whether Payton v. New York, 445 U.S. 573 (1980) should be applied retroactively to exclude evidence in cases pending on direct appeal. The government had argued that the exclusionary rule should not apply to evidence seized in good-faith reliance on pre-Payton law. This Court noted that the Government's position would eliminate all Fourth Amendment rulings from retroactive application and stated: "Failure to accord *any* retroactive effect to Fourth Amendment rulings would encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's wait until its decided approach." Johnson, 457 U.S. at 561. This Court ruled that Payton should apply to all those with cases on direct review. Johnson, 457 U.S. at 562.

In Griffith v. Kentucky, 479 U.S. 314 (1987), which was decided after recognition of the good-faith exception in United States v. Leon, 468 U.S. 897 (1984), this Court reaffirmed the Johnson decision that "subject to [certain exceptions], a decision of this Court construing the Fourth Amendment is to be

applied retroactively to all convictions that were not yet final at the time the decision was rendered." Griffith, 479 U.S. at 324. As in Johnson, this Court considered and rejected "reliance by law enforcement authorities on the old standards" as a reason not to apply a Fourth Amendment decision retroactively. Griffith, 479 U.S. at 324-325. This Court clearly stated:

> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Griffith, 479 U.S. at 328.

In Gant, this Court discussed the impact of good-faith reliance on precedents. In dissent Justice Alito noted that the Court's decision "will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law." Gant, 129 S.Ct. at 1726. (Alito, J., dissenting) The majority thought reliance on precedent would not trump constitutional rights:

> The fact the law enforcement community may view the State's version of the Belton rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights protected. If it is clear that a practice in unlawful, individuals' interests in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.

Gant, 129 S.Ct. at 1722-1723.

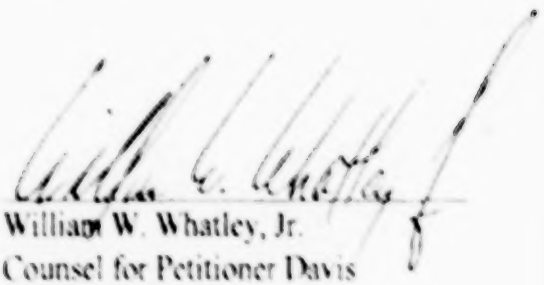
Considering the opinions for both the majority and the dissent in Gant, it appears that both sides assumed that suppression would follow from retroactive

application of the exclusionary rule, although none of the opinions expressly acknowledged or addressed that assumption. United States v. Debruhl, at 9. The final outcome in Gant is indicative of this position as well – the Arizona Supreme Court had not simply declared the search unconstitutional, but had also ordered the exclusion of the evidence. By affirming the Arizona Supreme Court's decision, this Court necessarily affirmed the exclusion of the evidence. Gonzalez, 598 F.3d at 1100.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted with the 8th day of June, 2010.



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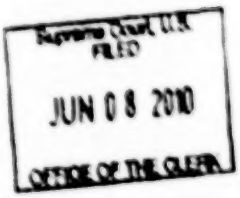

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by placing a copy of the same in the United States mail, postage prepaid,

addressed as above, on this the 8th day of June, 2010.

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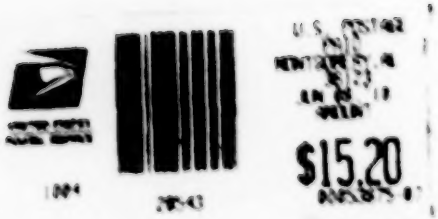

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2003

WILLIE GENE DAVIS,

Petitioner,

vs.

UNITED STATES,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

APPENDIX

EXHIBIT	DESCRIPTION OF DOCUMENT
"A"	United States v. Davis, ___ F.3d ___ (11th Cir. 2010)

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MARCH 11, 2010
JOHN LEY
CLERK

No. 08-16654

D. C. Docket No. 07-00248-CR-W-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE GENE DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(March 11, 2010)

Before TJOFLAT, BARKETT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

Police arrested Willie Gene Davis after a traffic stop and searched the car in which he was riding as permitted by our decision in *United States v. Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996). On evidence obtained from that search, Davis was convicted for the unlawful possession of a firearm. During the pendency of his appeal to this court, the Supreme Court overturned *Gonzalez* in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). We now decide whether the Fourth Amendment's exclusionary rule requires the suppression of evidence obtained from the search.

I

During a routine traffic stop in 2007, Sergeant Curtis Miller asked Willie Davis, the vehicle's only passenger, for his name. After a pause, Davis identified himself as "Ernest Harris." Miller could smell alcohol on Davis's breath, and he noticed Davis fidgeting with his jacket pockets. When the driver of the vehicle failed her field sobriety tests, Miller asked Davis to step out of the car.

As Davis exited the vehicle, he started to take off his jacket. Miller told him to leave it on, but Davis removed the jacket anyway and left it behind on the seat. Miller checked Davis for weapons and took him to the rear of the vehicle, where he asked a crowd of bystanders whether Davis's name was really Ernest Harris.

The bystanders gave Davis's true name, which Miller verified with the police dispatcher, using Davis's birth date.

Miller arrested Davis for giving a false name and placed him, handcuffed, in the back of his patrol car. The driver of the vehicle was also arrested, handcuffed, and placed in a separate patrol car. Once the vehicle's occupants had been secured, Miller searched it and found a revolver in one of Davis's jacket pockets.

After his indictment for possessing a firearm in violation of 18 U.S.C. § 922(g)(1), Davis filed a motion to suppress the gun. He conceded that our precedent required the court to deny his motion, but he moved to preserve the issue for appeal in light of the Supreme Court's grant of certiorari in *Arizona v. Gant*, 128 S. Ct. 1443 (2008). The district court denied his motion on the ground that Sergeant Miller had found the gun during a valid search incident to arrest.[1] Following a jury trial, Davis was convicted and sentenced to 220 months in prison.

II

In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Supreme Court held "that when a policeman has made a lawful custodial arrest of the occupant of an

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[1] The district court also concluded that police would inevitably have discovered the gun during an inventory search. Given our holding with respect to the exclusionary rule's good-faith exception, we find it unnecessary to address the inventory-search issue.

automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." In so holding, the Court purported to apply the limiting rationale of its decision in *Chimel v. California*, 395 U.S. 752 (1969), which had "established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee." *Belton*, 453 U.S. at 460. In its attempt to craft a "workable rule," however, the Court assumed "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary [item].'" *Id.* (alteration in original) (quoting *Chimel*, 395 U.S. at 763).

We, like most other courts, had read *Belton* to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment. *See, e.g.*, *Gonzalez*, 71 F.3d at 825. As the Supreme Court later explained, its opinion in *Belton* was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718.

In *Arizona v. Gant*, the Court rejected that prevailing reading of *Belton*: "We now know that articles inside the passenger compartment are rarely within

the area into which an arrestee might reach, and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches." 129 S. Ct. at 1723 (quotation marks and citation omitted). The Court replaced our interpretation of *Belton* with the following rule: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.*

Davis now relies on *Gant* to argue that the search after his arrest violated the Fourth Amendment and, therefore, that the gun recovered from his jacket should have been suppressed. The government responds that we should not retroactively apply the exclusionary rule to searches conducted in good-faith reliance on our precedent.

The retroactivity of a constitutional decision and the scope of the good-faith exception to the exclusionary rule are questions of law that we review *de novo*. *Glock v. Singletary*, 65 F.3d 878, 882 (11th Cir. 1995); *United States v. Martin*, 297 F.3d 1308, 1312 (11th Cir. 2002).

III

Although the Supreme Court's retroactivity doctrine has a complicated history, *see United States v. Johnson*, 457 U.S. 537, 542–48 (1982), it is now

settled that "a decision of [the Supreme] Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered," *id.* at 562, "with no exception for cases in which the new rule constitutes a 'clear break' with the past," *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).[2] *Accord Glazner v. Glazner*, 347 F.3d 1212, 1217 (11th Cir. 2003) ("[F]or newly announced rules governing criminal prosecutions, the Supreme Court has completely rejected both pure prospectivity, which occurs where a court gives a newly announced rule no retroactive effect, and modified prospectivity, which occurs where a court applies a newly announced rule retroactively on a case by case basis."). Because Davis's case was pending on direct appeal when *Gant* was decided, the rule announced in that decision applies to his case.

There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*. First, both he and the car's driver had been handcuffed and secured in separate police cruisers before Sergeant Miller performed the search. Second, Davis was arrested for "an offense for which police could not expect to find evidence in the passenger compartment," *Gant*, 129 S. Ct.

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[2] "Final" in this context refers to any "case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

at 1719, because Miller had already verified Davis's identity when he arrested him for giving a false name. *Gant* makes clear that neither evidentiary nor officer-safety concerns justify a vehicle search under these circumstances.

Our conclusion that the search violated Davis's constitutional rights does not, however, dictate the outcome of this case. "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983)). Consequently, we must still decide whether the fruits of the illegal search should be suppressed.

We are not the first court of appeals to consider this question, but the other circuits have split on the issue. In the aftermath of *Gant*, the Ninth and Tenth Circuits have reached opposite conclusions as to the exclusionary rule's application in cases like this one. *Compare United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) (applying the exclusionary rule to a pre-*Gant* search), *with United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) (relying on the rule's good-faith exception and refusing to require the suppression of evidence), *cert. denied*, No. 09-402 (Mar. 1, 2010). Similarly, before *Gant*, the Fifth Circuit refused to apply the exclusionary rule when police had relied in good faith on

prior circuit precedent, *United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (*en banc*), but the Seventh Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on caselaw in conducting a search, *United States v. 15324 County Highway E.*, 332 F.3d 1070, 1076 (7th Cir. 2003).[3] We now enter the fray and hold that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned.

A. *Retroactivity and the Exclusionary Rule*

In *United States v. Gonzalez*, 578 F.3d 1130, the Ninth Circuit reversed the denial of a motion to suppress evidence obtained in violation of *Gant*, even though the search at issue had occurred before *Gant* was decided. The basis for the court's decision was that retroactivity doctrine required not only the application of *Gant*'s new substantive rule, but also the application of the same remedy.[4]

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[3] *See also United States v. Brunette*, 256 F.3d 14, 19–20 (1st Cir. 2001) (applying the good-faith exception to approve police reliance on a defective warrant that was issued when intercircuit caselaw governing the sufficiency of the warrant application was "unclear").

[4] Justice Alito's dissent in *Gant* appears to make a similar assumption. *See* 129 S. Ct at 1726 (Alito, J., dissenting) ("The Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law . . . ."). But this assumption conflicts with the Court's statement that "the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance" on a broad reading of *Belton*. *Id.* at 1722 n.11 (Stevens, J.) (*obiter dictum*). Because the Court has explained that qualified-immunity doctrine employs "'the same standard of objective reasonableness'" that defines the contours of the good-faith exception to the exclusionary rule, *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)), the majority's

Because the defendant in *Gant* had benefitted from the exclusionary rule, the court explained, "'basic norms of constitutional adjudication'" required the suppression of evidence in all non-final cases involving similarly situated defendants. *Id.* at 1132 (quoting *Griffith*, 479 U.S. at 322–23).

We do not find this reasoning persuasive. The Ninth Circuit's decision turned, in large part, on its assumption that the Supreme Court's affirmance in *Gant* endorsed the manner in which the state court had applied the exclusionary rule below. *See Gonzalez*, 578 F.3d at 1132–33. But the Court's order granting Arizona's petition for a writ of certiorari in *Gant* explicitly limited the scope of review to the constitutionality of the search. 128 S. Ct. 1443. The Court's holdings are confined to the questions on which it grants certiorari, Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535–36 (1992), and in *Gant* neither the order granting certiorari nor the Court's subsequent opinion discusses the exclusionary rule at all.[5] In other words, the Court did not express approval of the exclusionary rule's application below merely by affirming the state court's

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statement fully supports our extension of the good-faith exception to cases involving reliance on well-settled precedent.

[5] In addition, the briefs and oral-argument transcript in *Gant* reveal that the State never argued for the application of the good-faith exception.

judgment.* Before the Supreme Court, *Gant* concerned the meaning of *Belton*, not the scope of the exclusionary rule.

We also disagree with the Ninth Circuit's contention that by declining to suppress evidence in cases like this we would fail to "fully appl[y]" *Gant*, thereby "violat[ing] 'the integrity of judicial review' by turning the court into . . . a legislative body announcing new rules but not applying them." *Gonzalez*, 578 F.3d at 1132 (quoting *Griffith*, 479 U.S. at 314). Our conclusion that Sergeant Miller's search violated Davis's constitutional rights *does* fully apply *Gant* to the facts of this case. *See United States v. Peoples*, 2009 WL 3586564, at *4 (W.D. Mich. Oct. 29, 2009). We consider constitutional violations and remedies separately in the Fourth Amendment context, *Leon*, 468 U.S. at 906, and the Supreme Court has refused to tie the retroactivity of new Fourth Amendment rules to the suppression of evidence, *see id.* at 912 n.9. As the Tenth Circuit observed in *McCane*, "[t]he issue before us . . . is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case." 573 F.3d at 1045 n.5.

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* The language of affirmance in *Gant* reads only: "The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed." 129 S. Ct. at 1724.

each of its decisions expanding the exception, the Court has concluded that the unlawful police conduct at issue was neither "sufficiently deliberate that exclusion [could] meaningfully deter it" nor "sufficiently culpable that such deterrence [would be] worth the price paid by the justice system." *Herring*, 129 S. Ct. at 702.

In this case, Sergeant Miller did not deliberately violate Davis's constitutional rights. Nor can he be held responsible for the unlawfulness of the search he conducted. At the time of the search, we adhered to the broad reading of *Belton* that the Supreme Court later disavowed in *Gant*, and a search performed in accordance with our erroneous interpretation of Fourth Amendment law is not culpable police conduct. Law enforcement officers in this circuit are entitled to rely on our decisions, and "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations," *Leon*, 468 U.S. at 921. As the Tenth Circuit explained, the general "purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities," and there would be little "significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement." *McCane*, 573 F.3d at 1044.

Because the exclusionary rule is justified solely by its potential to deter police misconduct, suppressing evidence obtained from an unlawful search is

inappropriate when the offending officer reasonably relied on well-settled precedent.[5] This conclusion is consistent with the Supreme Court's reasoning in *Leon*, in which it declined to require the suppression of evidence obtained in reliance on a facially sufficient warrant issued by a neutral magistrate judge:

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.

468 U.S. at 916 (footnote omitted). We see no meaningful distinction between a magistrate judge's error in applying Supreme Court precedent to a probable-cause determination and our error in applying that same precedent to the question of a warrantless search's constitutionality. The exclusionary rule must be "restricted to those situations in which its remedial purpose is effectively advanced," *Krull*, 480 U.S. at 347, and suppressing evidence obtained in reliance on well-settled precedent would be no more effective in deterring police misconduct than would

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[5] We recognize that applying the good-faith exception under these circumstances may weaken criminal defendants' incentive to urge "new" rules on the courts, but the exclusionary rule is designed to deter misconduct, not to foster the development of Fourth Amendment law. *Cf. Herring*, 129 S. Ct. at 700 n.2 (noting that the Court has rejected a conception of the rule that "would exclude evidence even where deterrence does not justify doing so").

suppressing evidence obtained pursuant to a judge's probable-cause determination.

C. Mistakes of Law and the Good-Faith Exception

With this decision, we join the Fifth and Tenth Circuits in refusing to apply the exclusionary rule when the police have reasonably relied on clear and well-settled precedent. *See McCane*, 573 F.3d at 1045 ("[T]his court declines to apply the exclusionary rule when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals."); *Jackson*, 825 F.2d at 866 ("[T]he exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law . . . ."). We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation. We have not forgotten the importance of the "incentive to err on the side of constitutional behavior," and we do not mean to encourage police to adopt a "'let's-wait-until-it's-decided approach'" to "unsettled" questions of Fourth Amendment law. *Johnson*, 457 U.S. at 561 (quoting *Desist v. United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting)).

The clarity of the *Belton* rule we followed before *Gant* is thus critical to our decision today. Although the Court in *Gant* insisted that *Belton* could have been interpreted in either of two ways, it also acknowledged that *Belton* was premised

on a "faulty assumption" to which the doctrine of *stare decisis* did not require adherence. *Gant*, 129 S. Ct. at 1719, 1723. Indeed, we, like most of the other courts of appeals, treated the broader, permissive reading of *Belton* as well-settled. It is precisely in situations like this, when the permissibility of a search was clear under precedent that has since been overturned, that applying the good-faith exception makes sense. When the police conduct a search in reliance on a bright-line judicial rule, the courts have already effectively determined the search's constitutionality, and applying the exclusionary rule on the basis of a judicial error cannot deter police misconduct. *Cf. Krull*, 480 U.S. at 360 n.17 ("[T]he question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence.").

Our decision here is therefore consistent with our holding in *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003), that "the good faith exception to the exclusionary rule . . . should not be extended to excuse a vehicular search based on an *officer's* mistake of law" (emphasis added). The justifications for the good-faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing caselaw. When the police rely on novel extensions of

our precedent, they engage in the sort of legal analysis better reserved to judicial officers, whose "detached scrutiny . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quotation marks and citation omitted), *quoted in Leon*, 468 U.S. at 913–14.[9] When law enforcement officers rely on precedent to resolve legal questions as to which "[r]easonable minds . . . may differ," *Leon*, 468 U.S. at 914, the exclusionary rule is well-tailored to hold them accountable for their mistakes.[10]

Although an officer's mistake of law cannot provide objectively reasonable grounds for a search, *Chanthasouxat*, 342 F.3d at 1279, the mistake of law here was not attributable to the police. On the contrary, the governing law in this circuit unambiguously allowed Sergeant Miller to search the car. Relying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute, *cf. Krull*, 480 U.S. 340, or a facially sufficient warrant, *cf. Leon*, 468 U.S. 897—not to personally misinterpreting the law.

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[9] Unlike police officers, "[j]udges and magistrates are not adjuncts to the law enforcement team." *Leon*, 468 U.S. at 917.

[10] Because reasonable minds often differ when considering merely persuasive precedents, our extension of the good-faith exception is necessarily limited to situations in which the published decisions of this court clearly dictated the constitutionality of a search.

In this case, Sergeant Miller performed a search that our contemporaneous interpretation of *Belton* clearly permitted. Had the Supreme Court not subsequently rejected that interpretation in *Gant*, we undoubtedly would have upheld the search as constitutional. Because the search was objectively reasonable under our then-binding precedent, suppressing the gun found in Davis's jacket would serve no deterrent purpose. In accordance with our holding that the good-faith exception allows the use of evidence obtained in reasonable reliance on well-settled precedent, we refuse to apply the exclusionary rule here. Davis's conviction is

AFFIRMED.

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
SEP 15 2010
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No. 09-11328

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence is admissible under the good-faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

IN THE SUPREME COURT OF THE UNITED STATES

No. 09-11328

WILLIE GENE DAVIS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 598 F.3d 1259.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2010. A petition for rehearing was denied on April 13, 2010.[1] The petition for a writ of certiorari was filed on June 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] A timely petition for rehearing would have been due on March 25, 2010. See Fed. R. App. P. 40(a)(1). Petitioner filed a pro se letter with the court of appeals on March 29, 2010, which the court construed as a petition for rehearing and denied. See 4/13/2010 C.A. Order. That rehearing petition does not affect the timeliness of the petition for a writ of certiorari.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 220 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A17.

1. On April 27, 2007, Greenville, Alabama police officers stopped the car in which petitioner was a passenger. The driver failed field sobriety tests, was arrested, and was placed in a police vehicle. Pet. App. A2; Gov't C.A. Br. 3.

While another officer administered sobriety tests to the driver, Officer Curtis Miller asked petitioner for his name. Petitioner told Officer Miller that his name was "Ernest Harris" but did not provide any identification. The officer smelled alcohol on petitioner's breath and noted petitioner's slurred speech. Petitioner was also fidgeting with his jacket pocket, and, despite being instructed not to do so, continued to move his hands in and out of his pockets. Pet. App. A2; 4/10/2008 Report & Recommendation 2 (Docket entry No. 50); Gov't C.A. Br. 3-4.

Officer Miller ordered petitioner out of the car in order to conduct a pat-down search. When petitioner began removing his jacket, Officer Miller told him to leave the jacket on. Despite that instruction, petitioner zippered his pocket shut, removed his

jacket, and left the jacket on the front passenger seat. After conducting a pat-down search of petitioner, Officer Miller inquired of bystanders whether petitioner was in fact Ernest Harris. An onlooker identified petitioner as Willie Gene Davis, and Officer Miller confirmed through his dispatcher that this was petitioner's identity. Officer Miller arrested petitioner for providing a false name to a law-enforcement officer, handcuffed petitioner, and secured petitioner in the back of his patrol car. Officer Miller then returned to petitioner's vehicle, searched the vehicle, and found a revolver in petitioner's jacket pocket. Pet. App. A2-A3; 4/10/2008 Report & Recommendation 2; Gov't C.A. Br. 4.

The officers then impounded the vehicle because the driver and petitioner had been arrested and were suspected of drinking alcohol. Before the vehicle was towed from the scene, the officers inventoried its contents as required by Greenville Police Department policy and prepared a written inventory report. Gov't C.A. Br. 4-5, 25.

2. Following his indictment, petitioner moved to suppress the revolver. The motion was referred to a magistrate judge who, after holding an evidentiary hearing, recommended that the motion be denied. 4/10/2008 Report & Recommendation. The judge concluded that the pistol had been found during a valid search incident to arrest under New York v. Belton, 453 U.S. 454 (1981), noted that the "parties agree that current law squarely covers these facts,"

and explained that petitioner merely sought "to preserve this issue" in the event that this Court's then-pending decision in Arizona v. Gant, 129 S. Ct. 1710 (2009), "affect[s] the legality of the search in this case." 4/10/2008 Report & Recommendation 4-5. In addition, the magistrate judge determined that an inventory search had been appropriately performed "under Greenville Police policy" in light of the arrest of both passengers and the "need to impound the vehicle." Id. at 5-6. The judge concluded that "[t]he officers inevitably would have discovered the evidence in the routine inventory search that they were required to perform" under that policy. Id. at 6.

The district court adopted the magistrate judge's recommendation and denied petitioner's motion to suppress on two independent grounds. First, the court concluded that the vehicle search was a valid search incident to arrest under Eleventh Circuit precedent. 4/28/2008 Order 1-2 (Docket entry No. 63) (citing United States v. Gonzales, 71 F.3d 819, 825 (11th Cir. 1996)). Second, the court denied suppression based on the inevitable discovery doctrine. Id. at 2-3. The court noted that "the gun was discovered during a search incident to arrest and not during an inventory search," but it concluded that, "as the Magistrate Judge noted, the officers would have inevitably discovered the jacket and its gun during the inventory search had they not already been confiscated" as part of "the search incident to arrest." Id. at 2 (citation omitted). The

court explained that "the circumstances warranted impoundment of the vehicle" and that "the police did undertake an inventory search and produced an inventory record * * * pursuant to standard operating procedures." Id. at 2-3. Because the "location of the jacket was so obvious" "in plain view on the passenger seat," the court found that the jacket, "and the gun it contained, would have inevitably been discovered during the inventory search." Id. at 3.

A jury found petitioner guilty of possessing a firearm after having been convicted of a felony. Pet. App. A3.

3. On April 21, 2009 -- two days before petitioner filed his objections to the magistrate judge's report -- this Court issued its decision in Gant. Neither petitioner's objections nor the district court's decision regarding those objections, however, discussed Gant or its impact on this case.

Gant explained that lower courts across the nation had "widely understood" that this Court's decision in New York v. Belton permitted vehicle searches incident to the lawful arrest of the vehicle's recent occupant even when "there is no possibility the arrestee could gain access to the vehicle at the time of the search." Gant, 129 S. Ct. at 1718. Gant specifically recognized that the appellate cases upholding searches conducted after the vehicle's occupant had been arrested, handcuffed, and placed in a squad car "are legion." Ibid. (quoting Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)).

Gant ultimately read Belton more narrowly than the courts of appeals had done. Gant held that the search of a vehicle incident to a lawful arrest may include the vehicle's passenger compartment only if the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or if "it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" Gant, 129 S. Ct. at 1719 (citation omitted).

4. The court of appeals subsequently affirmed. Pet. App. A1-A17. The court "h[e]ld that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned." Id. at A8.

The court of appeals explained that, when the officer conducted the search in this case in 2007, the search was "permitted by [its] decision in United States v. Gonzalez, 71 F.3d 819, 825 (11th Cir. 1996)." Pet. App. A2. And Gonzalez, like decisions from other courts, "had read Belton to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment." Id. at A4; see id. at A16. The court of appeals concluded that Gant "rejected that prevailing reading of Belton," id. at A4, and that a Supreme Court decision like Gant that "constru[es] the Fourth Amendment [must] be applied retroactively

to all convictions that [are] not yet final at the time the decision was rendered." Id. at A5-A6 (quoting United States v. Johnson, 457 U.S. 537, 562 (1982)). The court accordingly determined that the search in this case was unlawful because it "violated Davis's Fourth Amendment rights as defined in Gant." Id. at A6.

The court of appeals also concluded, however, that its Fourth Amendment holding did not "dictate the outcome of th[e] case" because the question of suppression "is 'an issue separate from the question whether the Fourth Amendment'" was violated. Pet. App. A7 (quoting United States v. Leon, 468 U.S. 897, 906 (1984)). The exclusionary rule's remedy of suppression, the court explained, "is not an individual right." Id. at A11 (quoting Herring v. United States, 129 S. Ct. 695, 700 (2009)). Instead, suppression is appropriate "only where it 'result[s] in appreciable deterrence'" and "'the benefits of deterrence • • • outweigh the costs.'" Ibid. (quoting Herring, 129 S. Ct. at 700) (brackets in original). In other words, suppression "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct" and "should not be applied[] to deter objectively reasonable law enforcement activity." Ibid. (quoting Herring, 129 S. Ct. at 698, and Leon, 468 U.S. at 919, respectively). Based on those principles, the court held that suppression was unwarranted because "the exclusionary rule is justified solely by its potential to

deter police misconduct"; the "offending officer reasonably relied on [the court of appeals'] well-settled precedent"; and "'penalizing the officer for the court's error'" in applying Belton before Gant "'cannot logically contribute to the deterrence of Fourth Amendment violations.'" Id. at A12-A13 (quoting Leon, 468 U.S. at 921) (brackets omitted).

The court of appeals explained that it "join[ed] the Fifth and Tenth Circuits" in concluding that the good-faith exception to the exclusionary rule applies when "the police have reasonably relied on clear and well-settled precedent." Pet. App. A14 (discussing United States v. McCane, 573 F.3d 1037 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010), and United States v. Jackson, 825 F.2d 853 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988)). And although the court acknowledged that the Ninth Circuit had held otherwise and created a circuit "split on the issue," it concluded that the Ninth Circuit's reasoning was not "persuasive." Id. at A7-A10 (discussing United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009), reh'g denied, 598 F.3d 1095 (2010), petition for cert. pending, No. 10-82 (filed July 14, 2010)).

The court of appeals noted the district court's separate "conclu[sion] that [the] police would inevitably have discovered [petitioner's] gun during an inventory search." Pet. App. A3 n.1. But in light of its "holding with respect to the exclusionary

rule's good-faith exception," the court of appeals found it "unnecessary to address the inventory-search issue." Ibid.

ARGUMENT

Petitioner contends (Pet. 5-17) that this Court's review is warranted to resolve a conflict of authority on whether the good-faith exception to the exclusionary rule applies when law-enforcement officers conduct a search in objectively reasonable reliance on court of appeals precedent that is subsequently overturned by this Court. The court of appeals correctly held that suppression is unwarranted in these circumstances. Although the United States agrees with petitioner that the question presented is an important and recurring one on which there is a conflict among the courts of appeals and state supreme courts, this case is not a good vehicle to resolve that question. Therefore, no further review is warranted.[2]

1. In United States v. Gonzalez, No. 10-82, the government has petitioned this Court for a writ of certiorari on the question presented in this case. The government's petition in Gonzalez explains that the suppression of evidence from a search is not warranted when, as here, law-enforcement officers conducted the search in objectively reasonable reliance on binding appellate

---

[2] In the alternative, this Court may wish to hold this petition pending its disposition of the government's petition for a writ of certiorari in United States v. Gonzalez, No. 10-82 (filed July 14, 2010).

precedent that, after the search, is overturned by this Court. Pet. at 10-17, Gonzalez, supra (filed July 14, 2010).[1] In such circumstances, suppression cannot serve the sole purpose of the exclusionary rule, which is "to deter deliberate, reckless, or grossly negligent conduct" by law enforcement officers. Herring v. United States, 129 S. Ct. 695, 702 (2009). The government also explained in Gonzalez that the question presented is an important and recurring one that has divided the federal courts of appeals and state supreme courts and that remains pending in numerous cases. Pet. at 17-20, Gonzalez, supra; see Reply at 6-9, Gonzalez, supra.

2. This case, however, is not a good vehicle to resolve the question presented and need not be held pending resolution of the petition in Gonzalez because the evidence that petitioner seeks to suppress is independently admissible under the inevitable-discovery exception to the exclusionary rule. The judgment below thus may be affirmed on those alternative grounds without reaching the question presented. See Schiro v. Farley, 510 U.S. 222, 228-229 (1994) (a respondent may "rely on any legal argument in support of the judgment below"); accord Bennett v. Spear, 520 U.S. 154, 166-167 (1997); Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

---

[1] The government's petition for a writ of certiorari and reply in Gonzalez (No. 10-82) are publicly available at http://www.justice.gov/osg/briefs/2010/2pet/7pet/toc3index.html.

The inevitable-discovery doctrine permits evidence to be admitted in a criminal trial, even when it was not lawfully seized, if the government establishes that "the information ultimately or inevitably would have been discovered by lawful means." Nix v. Williams, 467 U.S. 431, 444 (1984). The doctrine reflects the judgment that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." Id. at 443-444.

In this case, the car in which petitioner was a passenger was stopped on a public street and, following the arrest of all occupants, the car was impounded. The Greensville Police Department's inventory-search policy required the officers to inventory the vehicle's contents before it was towed from the scene. Gov't C.A. Br. 25. The district court expressly found that the inventory search here "was conducted pursuant to [those] standard operating procedures," and it further held that officers were justified in impounding the car because all of its occupants had been arrested and were under the influence of alcohol. 4/28/2008 Order 2-3 (Docket entry No. 63). In light of those findings and the "undisputed [fact] that the jacket was lying in plain view on the passenger seat," the district court specifically found that the "[jacket], and the gun it contained, would have

inevitably been discovered during the inventory search." Id. at 3. Those fact-bound findings are correct and independently justify the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold this petition pending its disposition of the petition in Gonzalez, No. 10-82.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
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SEPTEMBER 2010

No. 09-11328

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 15th day of September, 2010.

[See Attached Service List]

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September 15, 2010

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

09-11328
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JOINT APPENDIX

Supreme Court, U.S.
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No. 09-11328

In The
Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted November 1, 2010

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U.S. District Court
Alabama Middle District (Montgomery)
CRIMINAL DOCKET FOR CASE
#: 2:07-cr-00248-WKW-TFM-1

USA v. Davis

Date Filed	#	Docket Text
10/22/2007	1	INDICTMENT as to Willie Gene Davis (1) count(s) 1. (ws,) (Entered: 10/23/2007)
10/31/2007	6	Minute Entry for proceedings held before Judge Terry F. Moorer :Initial Appearance as to Willie Gene Davis held on 10/31/2007 (PDF available for court use only) (Recording Time 3:32-3:46 pm.) (sql,) (Entered: 11/01/2007)
11/01/2007	7	Minute Entry for proceedings held before Judge Terry F. Moorer :Arraingment as to Willie Gene Davis (1) Count 1 held on 11/1/2007 (PDF available for court use only), Detention Hearing as to Willie Gene Davis held on 11/1/2007 (PDF available for court use only), Plea entered by Willie Gene Davis Not Guilty on counts 1. (PDF available for court use only) (Recording Time 11:55 am-12:42 pm.) (Attachments: # 1 Witness List) (sql,) (Entered: 11/01/2007)

11/01/2007	8	ORDER as to Willie Gene Davis re 4 MOTION for Detention filed by USA setting a Detention Hearing for 11/1/2007 11:30 AM in Courtroom 4A before Honorable Terry F. Moorer. Signed by Judge Terry F. Moorer on 11/1/07. (ajr,) (Entered: 11/01/2007)
03/18/2008	38	PRETRIAL CONFERENCE ORDER as to Willie Gene Davis setting Jury Selection for 5/5/2008 before Honorable William Keith Watkins. Jury Trial (ETT 2 days) set for 5/5/2008 before Honorable William Keith Watkins. Voir Dire due by 4/28/08; Proposed Jury Instructions due by 4/28/2008; Motions in Limine due by 4/28/2008; Notice of Intent to Change Plea due by noon on 4/23/2008. Signed by Judge Terry F. Moorer on 3/18/08. (ajr,) (Entered: 03/18/2008)
04/01/2008	42	MOTION to Suppress *Evidence Found in Vehicle* by Willie Gene Davis. (Van Heest, Joseph) (Entered: 04/01/2008)
04/07/2008	46	RESPONSE to Motion by USA as to Willie Gene Davis re 42 MOTION to Suppress *Evidence Found in Vehicle* (Shepherd, Matthew) (Entered: 04/07/2008)

04/07/2008	47	Minute Entry for proceedings held before Judge Terry F. Moorer :Motion Hearing as to Willie Gene Davis held on 4/7/2008 re 26 MOTION to Quash filed by Alabama Board of Pardons and Paroles (PDF available for court use only) (Recording Time 9:01-9:48 am.) (sql,) (Entered: 04/07/2008)
04/07/2008	48	ORDER denying as moot 26 Motion to Quash Subpoena as to Willie Gene Davis (1). Signed by Judge Terry F. Moorer on 4/7/08. (ajr,) (Entered: 04/07/2008)
04/08/2008	49	Minute Entry for proceedings held before Judge Terry F. Moorer :Evidentiary Hearing as to Willie Gene Davis held on 4/8/2008 re 42 MOTION to Suppress *Evidence Found in Vehicle* filed by Willie Gene Davis (PDF available for court use only) (Court Reporter Risa Entrekin.) (Attachments: # 1 Witness List# 2 Government Exhibit List# 3 Defendant Exhibit List) [exhibits attached to lists] (sql,) (Entered: 04/08/2008)
04/10/2008	50	REPORT AND RECOMMENDATIONS as to Willie Gene Davis re 42 MOTION to Suppress *Evidence Found in Vehicle* be DENIED. Objections to R&R due by 4/23/2008. Signed by Judge Terry F. Moorer on 4/10/2008. (sql,) (Entered: 04/10/2008)

04/23/2008	56	OBJECTION TO REPORT AND RECOMMENDATIONS 50 by Willie Gene Davis (Attachments: # 1 Exhibit Inventory Record and Cover Sheet) (Van Heest, Joseph) (Entered: 04/23/2008)
04/28/2008	63	ORDER ADOPTING 50 REPORT AND RECOMMENDATION as to Willie Gene Davis; OVERRULING 56 objection; denying 42 Motion to Suppress filed by Willie Gene Davis. Signed by Honorable William Keith Watkins on 4/28/08. (ajr,) (Entered: 04/28/2008)
05/12/2008		JURY TRIAL BEGUN before Judge William Keith Watkins as to Willie Gene Davis on 5/12/2008 (see final trial entry for pdf) (PDF available for court use only). (Court Reporter Risa Entrekin.) (ajr,) (Entered: 05/13/2008)
05/13/2008	76	JURY VERDICT as to Willie Gene Davis (1) Guilty on Count 1. (ajr,) (Entered: 05/13/2008)
05/13/2008	77	Minute Entry for JURY TRIAL held 5/5/08, 5/12/08-5/13/08 before Judge William Keith Watkins:(PDF available for court use only) (Court Reporter Risa Entrekin.) (Attachments: #(1) Witness List, #(2) Government's Exhibit List, #(3) Designation of Case Agent, #(4) Defendant's Exhibit List, #(5) Joint Exhibit List) (ajr,) (Entered: 05/13/2008)

05/14/2008	78	ORDER as to Willie Gene Davis: Sentencing set for 8/5/2008 09:00 AM in Courtroom 2E before Honorable William Keith Watkins. Signed by Honorable William Keith Watkins on 5/14/2008. (ag,) (Entered: 05/14/2008)
11/06/2008	109	Minute Entry for SENTENCING held 11/6/08 before Judge William Keith Watkins as to Willie Gene Davis for 1. (PDF available for court use only) (Court Reporter Risa Entrekin.) (ajr,) # 1 Government's Exhibit List, # 2 Court's Exhibit List) (ajr,) Modified on 11/13/2008 to correct text (ajr,). (Entered: 11/06/2008)
11/18/2008	111	JUDGMENT as to Willie Gene Davis (1), Count(s) 1, 220 Mos Imp; 5 Yrs Sup Rel; $100 AF. Signed by Honorable William Keith Watkins on 11/18/08. (ajr,) (Entered: 11/18/2008)
11/18/2008	112	NOTICE OF APPEAL by Willie Gene Davis re 111 Judgment (Halstrom, Timothy) (Entered: 11/18/2008)

United States Court of Appeals
For the Eleventh Circuit Docket Sheet

08-16654-FF
USA v. Willie Gene Davis

File Date	Entry	Party	Pending
06/10/2009	E-Brief Tendered: Appellant by William Wayne Whatley, Jr.	Willie Gene Davis	No
06/15/2009	Appellant Brief Filed: M7/02/09. PT'D Missing original signature on COS, TRR (Atty: William Wayne Whatley, Jr.)	Willie Gene Davis	No
07/14/2009	E-Brief Tendered: Appellee by Matthew W. Shepherd)	United States of America	No
07/15/2009	Appellee Brief Filed: (Atty: Matthew W. Shepherd)	United States of America	No
12/03/2009	Oral Argument Scheduled: 12/03/09		No
12/07/2009	William Wayne Whatley, Jr. argued for Appellant; Matthew W. Shepherd argued for Appellee		No
03/11/2010	Judgment Entered		No
03/11/2010	OPIN1 (Notice of issuance of opinion)		No

	issued. c:Douglas L. O'Keefe; c:Matthew W. Shepherd; c:W. Keith Watkins; c:William Wayne Whatley, Jr.		
03/11/2010	Opinion Issued		No
03/29/2010	Petition for Rehearing (aplt's letter construed as a petition for rehearing): (Pro Se)	Willie Gene Davis	No
04/14/2010	The petition for rehearing filed by WILLIE GENE DAVIS is DENIED.		No
04/22/2010	CASE CLOSED-Mandate Issued		No
04/22/2010	Mandate Issued		No
06/15/2010	Notice of Filing Certiorari: SC #09-11328 (Atty: William Wayne Whatley, Jr.)	Willie Gene Davis	No
11/01/2010	Certiorari Granted SC #09-11328	Willie Gene Davis	Yes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	CR. NO. 2:07cr-248-WKW [18 USC 922(g)(1)]
v.	)	INDICTMENT
WILLIE GENE DAVIS	)	(Filed Oct. 22, 2007)

The Grand Jury charges:

COUNT 1

On or about the 27th day of April, 2007, in Butler County, Alabama, within the Middle District of Alabama,

WILLIE GENE DAVIS,

defendant herein, having been convicted on or about the dates set forth below of the offenses set forth below, each a felony punishable by imprisonment for a term exceeding one year under the laws of the State of Alabama:

CONVICTION DATE	COURT	CASE NUMBER	OFFENSE
November 1, 1977	Circuit Court, Crenshaw County, Alabama	CC-1260	Burglary 2nd Degree
October 12, 1981	Circuit Court, Crenshaw County, Alabama	CC-81-197	Burglary 3rd Degree

November 16, 1992	Circuit Court, Crenshaw County, Alabama	CC-92-94	Escape 2nd Degree
April 16, 1996	Circuit Court, Crenshaw County, Alabama	CC-95-52	Distribution of Controlled Substance (5 Counts)

did knowingly possess, in and affecting commerce, a firearm; that is, an Iver Johnson revolver, model 1900, a better description which is otherwise unknown to the grand jury.

All in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL:

/s/ [Illegible]
Foreperson

/s/ Leura G. Canary
LEURA G. CANARY
UNITED STATES ATTORNEY

/s/ Tommie Brown Hardwick
Tommy Brown Hardwick
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	**Case No.: 2:07CR248-WKW**
v.	)	
	)	
WILLIE GENE DAVIS	)	

MOTION TO SUPPRESS EVIDENCE FOUND IN VEHICLE

(Filed Apr. 1, 2008)

COMES NOW the defendant, Willie Gene Davis, by and through undersigned counsel, Joseph P. Van Heest, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, and respectfully moves this Court for an Order suppressing all items seized from the vehicle following a "search incident to arrest" of the driver of the vehicle, Ms. Stella Owens, for DUI, as well as all information, evidence and statements obtained as a result or as a fruit of that seizure.

At a hearing on this Motion, the defendant would expect the evidence would show the following:

1. On April 27, 2007, Mr. Davis was a passenger in a vehicle driven by Ms. Stella Owens. Greenville Police Officer Kenneth Hadley conducted a traffic stop on the vehicle driven by Ms. Owens in Greenville, Alabama. During the traffic stop, Greenville Police Officer Miller directed Mr. Davis to exit the vehicle. According to the information provided in

discovery, while Mr. Davis was exiting the vehicle, he unzipped his jacket and removed it, leaving it in the passenger seat of the vehicle as he exited.

2. Officer Hadley determined that Ms. Owens had not passed a field sobriety test and she was then arrested for driving under the influence (DUI).

3. Thereafter, Officer Miller requested Mr. Davis to stand near the rear of the vehicle with Butler County Sheriff's Deputy Williams. While Mr. Davis was secured near the rear of the vehicle, and not providing any danger to the police officers, Officer Miller searched the passenger compartment including the jacket Mr. Davis had been wearing.

4. The basis for searching the passenger compartment of the vehicle including Mr. Davis' jacket was a "search incident to arrest" of Stella Owens. She was already in custody and there was no evidence which needed to be preserved. She was under arrest for DUI and would need to be transported to the police station for a breath test to determine blood alcohol content. However, there was no evidence which the police were seeking to preserve. Rather, they were simply looking for an opportunity to conduct a warrantless search of the car for evidence of an unspecified and unrelated offense.

5. In *Arizona v. Gant*, No. 07-542 (cert granted Feb. 25, 2008), the United States Supreme Court granted the State's petition for writ of certiorari to decide whether, under *New York v. Belton*, 453 U.S. 454 (1981), police may conduct a warrantless search

of a car if its recently arrested occupant poses no threat to officer safety or preservation of evidence. The Supreme Court of Arizona held that they may not in *State v. Gant,* 162 P.3d 640, 642 (Ariz. 2007). The Arizona Supreme Court distinguished the circumstances of that case (which is factually similar to the instant case) from the precise question presented in *New York v. Belton, supra,* and held that neither of the *Chimel*[1] rationales that excuse the warrant requirement for searches incident to arrest – officer safety or the preservation of evidence – justified the warrantless arrest of Gant's car. Therefore, the Arizona Supreme Court held that the evidence found during the warrantless search must be suppressed.

6. Presently, the law in the Eleventh Circuit is contrary to the Arizona Supreme Court's holding in

---

[1] *Chimel v. California,* 395 U.S. 762 (1969) held that in order to dispense with a warrant requirement on grounds of a search incident to arrest, the government needed to show the need to protect officers and preserve evidence. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. *Id.*, at 762-63.

Gant, which is, as previously stated, now under review to be heard in the October, 2008 term of the United States Supreme Court.

7. The current Eleventh Circuit authority would be found in *United States v. Gonzales,* 71 F.3d 819 (11th Cir. 1996), and *United States v. Diaz-Lizaraza,* 981 F.2d 1216 (11th Cir. 1993).

8. In *United States v. Gonzales,* 71 F.3d 819, 825-26 (11th Cir. 1996), the Eleventh Circuit addressed a similar situation and held that a lawful arrest of an occupant of the vehicle permitted a search incident to an arrest of the passenger compartment of the vehicle.

> When an occupant of an automobile is the subject of a lawful arrest, the Fourth Amendment permits the arresting officers to contemporaneously conduct a warrantless search not only of the occupant himself, *see United States v. Robinson, supra,* but also of the passenger compartment of the automobile, as well as any closed (or open) containers found in this area of the automobile., (citing *New York v. Belton,* 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981); *United States v. Diaz-Lizaraza,* 981 F.2d 1216, 1222 (11th Cir.1993). "Containers," in this context, refer to "any object capable of holding another object," *New York v. Belton, supra,* 453 U.S. at 460 n. 4, 101 S.Ct. at 2864 n. 4, and thus include an automobile's glove compartment (whether locked or unlocked), as well as any containers found therein, such

> as the zipped leather bag that was discovered in this case.)

Id., at 825-26. Under this reasoning, the definition of container would include a zippered jacket pocket left inside a vehicle. Furthermore, in *United States v. Diaz-Lizaraza*, 981 F.2d 1216 (11th Cir. 1993), the Eleventh Circuit, relying upon *Belton, supra*, upheld a warrantless search of a truck as "incident to an arrest." There, the Court of Appeals noted:

> Because Diaz's arrest was proper, the search of the passenger compartment of his truck was proper as a search incident to an arrest. When officers lawfully arrest an automobile occupant, they may search the passenger compartment of the automobile as a contemporaneous incident of the arrest, and they also may examine the contents of containers found in the automobile. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). The purpose for a search incident to arrest is to find weapons that the suspect may use to injure police officers and to collect and preserve evidence. *Michigan v. Long*, 463 U.S. 1032, 1049-50 n. 14, 103 S.Ct. 3469, 3481 n. 14, 77 L.Ed.2d 1201 (1983); *Belton*, 453 U.S. at 457, 460 n. 3, 101 S.Ct. at 2864 n. 3. This purpose defines the permissible scope of an automobile search incident to an arrest. *Florida v. Jimeno*, 500 U.S. 248, ___, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991) ("The scope of a search is generally defined by its expressed object.").

> The simple search that Agent Anaipakos performed in this case was well within the scope allowed by *Belton*. Anaipakos confined his search to the passenger compartment of the truck. He looked under the seats and on the floor of the truck, but did not rip the upholstery, look under the hood, or damage the truck in any way. This was a reasonable search incident to arrest in light of the agents' need to protect themselves and to collect and preserve evidence. (Footnote omitted) Therefore, there was no Fourth Amendment violation in removing Diaz's beeper from the truck.

Id., at 1222-23.

9. The defendant would not prevail under existing Eleventh Circuit precedent. However, unless the Government stipulates that the facts of the instant case would apply to whatever ruling the Supreme Court reaches in *Gant*, it will be necessary to conduct an evidentiary hearing to properly preserve the issue for review.

WHEREFORE, for the reasons set forth above, the defense moves to suppress the evidence found during the search of the vehicle incident to the arrest of the driver of the vehicle, Ms. Stella Owens, as being violative of the Fourth Amendment right to be free from unreasonable searches and seizures.

Dated this 1st day of April, 2008.

Respectfully submitted

/s/ Joseph P. Van Heest

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES
OF AMERICA

vs. CASE NO.: 2:07cr248-WKW

WILLIE GENE DAVIS,

Defendant.

* * * * * * * * * * * *

HEARING ON MOTION TO SUPPRESS

* * * * * * * * * * * *

BEFORE THE HONORABLE TERRY F. MOORER, UNITED STATES MAGISTRATE JUDGE, at Montgomery, Alabama, on Tuesday, April 8, 2008, commencing at 10:01 a.m.

APPEARANCES:

FOR THE GOVERNMENT:
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FOR THE DEFENDANT:
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Proceedings reported stenographically;
transcript produced by computer.

[2] EXAMINATION INDEX

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DIRECT BY MR. VAN HEEST 55

* * * * * * * * * * *

(The following proceedings were heard before the Honorable Terry F. Moorer, United States Magistrate Judge, at Montgomery, Alabama, on Tuesday, April 8, 2008, commencing at 10:01 a.m.:)

(Call to Order of the Court)

THE COURT: Good morning.

MR. SHEPHERD: Good morning, Your Honor.

THE COURT: Now is the time that the Court has set for a hearing in the case of United States versus Willie Gene Davis, Case Number 7cr248. Is the United States ready to proceed?

MR. SHEPHERD: We are, Your Honor.

THE COURT: Is the defendant?

MR. VAN HEEST: Yes, Your Honor, we are.

THE COURT: Now, gentlemen, I understand before we get started that essentially the

parties agree upon the facts. And the way that the law sits in the Eleventh Circuit is that if the facts are as set out in the motion, that the motion would then be due to be overruled. But if the Supreme Court changes the Eleventh Circuit line of reasoning by way of a case which they [3] have granted certiorari to, then the outcome may be different. Am I correct, gentlemen?

MR. VAN HEEST: I think that's a fair statement, Your Honor, although it will be necessary to take testimony because none of us can anticipate, if the Supreme Court rules, how broadly or narrowly they might rule on this issue. So we need to establish what the facts are. We both put, I think, and agreed pretty much as to what the expected facts would be, but I think both sides want to make sure there's an opportunity for the Court to hear the facts because it's possible that the Supreme Court could – if they ruled in *Arizona versus Gant* in Mr. Gant's favor, it might narrow the way Belton has been – *New York versus Belton* has been interpreted. And the question then would be does it narrow it a lot or just simply a little and under what circumstances. And for the appellate courts to be able to determine whether there is sufficient information and sufficient facts after that case to overrule in the event that *Gant* turns out in Mr. Gant's favor, we would need to – we would need to make a record here. And that's basically what we're doing.

We understand and I think I made it very clear when I filed the motion that the law is contrary to us

at this point but that the reason for filing the motion and making it nonfrivolous is that there is this issue now that the Court is going to – the Supreme Court is going to consider. And if we [4] fail to make a record and we fail to preserve the issue, it's very, very doubtful that it would be done retroactively. But if this case is on appeal at the time – if we were to lose the case and the case was on appeal at the time, there would need to be a record made.

THE COURT: Okay. I just wanted to make sure my understanding was correct, that as it sits now, if the facts come out as the parties have laid them out, that the ruling should be to overrule the motion to suppress.

Okay. Go ahead. Call your first witness.

MR. SHEPHERD: Yes, Your Honor. The government calls Curtis Miller.

CURTIS EUGENE MILLER, the witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHEPHERD:

Q. Will you please state your full name.

A. Curtis Eugene Miller.

Q. And where are you currently employed?

A. Greenville Police Department, Greenville, Alabama.

Q. And what's your current rank or job title?

A. Sergeant. Patrol sergeant.

Q. And Sergeant Miller, how long have you been with the Greenville Police Department?

A. Six years and two months.

[5] Q. And do you have any specific training prior to becoming a police officer?

A. Other than college, no.

Q. Have you attended any police academies?

A. Yes, I have.

Q. Which one?

A. I attended the basic police academy at Selma, Alabama, State Trooper Academy.

Q. Prior to becoming a police officer – well, first, is Greenville the only place you've been a police officer?

A. Yes, it is.

Q. Prior to becoming a police officer, what did you do?

A. I was employed by the U.S. Air Force.

Q. And for how long?

A. Eight and a half years.

Q. Are you currently still employed by the Air Force in any capacity?

A. Yes. I am in the Air National Guard.

Q. And what were your jobs both on active duty and currently in the reserves?

A. On active duty, I spent eight and a half years with the Air Force in a special operations helicopter unit.

MR. VAN HEEST: Your Honor, unless he's got testimony about some kind of law enforcement background within the Air Force, I don't believe the Air Force background is relevant and [6] I would object.

THE COURT: I'm going to overrule it. I mean –

MR. SHEPHERD: He was about to get to that, having a law enforcement background.

MR. VAN HEEST: Okay.

Q. Sergeant Miller, do you have any law enforcement background in the Air Force?

A. Yes, I do.

Q. And what is that?

A. I'm a security forces squad leader.

Q. And does that involve military police duties?

A. Yes, it does. It's equivalent to military police.

Q. Now, getting back to Greenville, Alabama, where you're a sergeant on the police force, what are your duties there?

A. I manage A shift, the day shift patrol.

Q. On April 27th of 2007, were you also on duty?

A. Yes, I was.

Q. And what was your duty that day?

A. I was corporal on a night shift patrol.

Q. During the course of your duty on April 27th, 2007, did you respond to an – a traffic stop conducted by an Officer Hadley?

A. Yes, I did.

Q. Could you please describe what happened to bring you out to that scene.

A. I was on – Patrol Officer Hadley had stopped a vehicle on [7] South Washington Street. And he stated that he had stopped the vehicle for loud and excessive noise, which is a city ordinance. And he thought the vehicle was – the driver was DUI.

Q. Is that why he then called you, because he suspected DUI?

A. I – he didn't call me. I go to all of my officers' traffic stops to ensure that if they do need assistance, I'm there to provide it.

Q. Now, when you arrive at the scene, please describe what you saw.

A. I saw two – two people in a vehicle in front of his patrol unit. He was standing at the driver's-side door of that vehicle that he had stopped.

Q. What did you do when you arrived?

A. I pulled my patrol unit up behind his and walked up to the passenger side of the offender's vehicle.

Q. Was there a passenger in the passenger side?

A. There was – there was a passenger in the vehicle. Yes, sir.

Q. Was he in the front or the back passenger?

A. The front passenger. Front right passenger.

Q. Did you talk to that passenger?

A. Yes, I did.

Q. What was the substance of that conversation?

A. I asked what his name was. He stated it was Ernest Harris. [8] I asked where he stayed at. He said he stayed in Luverne.

Q. Did he show you any identification at that point?

A. No, he did not.

Q. What was your purpose in talking to the passenger at that stage?

A. Just to get – just to get his basic information, just talk to him, provide cover for Officer Hadley while he performed his traffic stop.

Q. What was Officer Hadley doing while you were up at the passenger side of the vehicle?

A. He was talking to the driver. She's a female. He was – as he was talking to her, he – he stated he could smell alcohol on her breath. He got her out of the vehicle at that time and started performing standardized field sobriety tests.

Q. Were you observing these field sobriety tests?

A. At glances, yeah, I saw him performing them.

Q. Did Officer Hadley inform you of what the results of those field sobriety tests were?

A. She – she was arrested. She failed to perform her field sobriety tests as he instructed her.

Q. Are you aware of whether he administered any type of drug/alcohol test?

A. Yes, he did.

Q. And are you aware of what the results were?

A. It was.14 percent blood alcohol.

[9] Q. And is that over the legal limit in the state of Alabama?

A. Yes, it is.

Q. While these field sobriety tests were being performed by Officer Hadley, what were you doing?

A. I was talking to the passenger. After she was arrested and placed in handcuffs, he placed her in the back of his patrol unit. I was watching the – the passenger of the vehicle. At that time, he – he was fidgeting with his jacket at the time of the traffic stop. I told him once or twice to take his hands out of his pockets; don't – don't mess with your jacket. At that time, I thought that he possibly had something in his jacket.

Q. What specifically was he doing with his jacket?

A. He kept trying to put his hands in his pockets. And at that point, he took his hand out of the jacket and zipped it up. He zipped the jacket up or the pocket he was – his hand was in.

Q. And if you could, what kind of jacket was this?

A. It was some kind of sports jacket, gym attire.

Q. What did you do – well, first, could you smell any alcohol or anything to make you suspect that he had been drinking as well?

A. I could. I could smell alcohol on his breath. I could tell his speech was slurred when he was talking to me.

Q. And what did you do at that point?

A. After she was arrested and placed in the back of Officer [10] Hadley's car, I went and got him out and patted him down for weapons. At that time, as soon as he opened the door, he stood up and the car door – between the car door and the car and attempted to take his jacket off. I told him leave the jacket on. Once or twice I told him to leave the jacket on. He refused to leave the jacket on. He shed the jacket, put it in the front seat where he was sitting.

Q. When you patted him down, did he have the jacket on?

A. No, he did not.

Q. Where did you take him or what did you do with the passenger?

A. After I patted him down, I took him to the rear of my vehicle – the rear of the offender's vehicle.

Q. And what did you do there?

A. I asked – there was a bunch of people standing out on the side of the road. I asked one of those people if that was his name. I – he gave me the impression that he was lying to me about his name, so I asked. And they said, no, that's Willie – that's Willie Davis. I said, okay, well, I'll place – before I placed him under arrest, I ran his name and his birthday through our 911 center, and it turned out that was Willie Gene Davis. And at that time, I arrested him for giving a false name to law enforcement.

Q. You said a minute ago it appeared that he was not being honest with you about his name.

[11] A. Right.

Q. What specifically struck you as him being dishonest?

A. His hesitation and the way he was speaking to me. It appeared that he was trying to make up – make up a name to give to me.

Q. When you say you placed him under arrest, what specifically did you do?

A. I placed him – I placed him – placed him in handcuffs behind his back, and I put him in my rear seat of my patrol car.

Q. Was that in the same patrol car where the driver was?

A. No. Separate patrol cars.

Q. What did you do then?

A. After that, we went back up to the car. After both the passenger and the driver were arrested, we went back to the car to inventory the vehicle for an impound. The vehicle was going to be impounded. At that time, while looking through the vehicle, inventorying it, I looked in the jacket that he was wearing, and I located a pistol in that jacket.

Q. I want to go back to this jacket. Where was it located in the vehicle?

A. Laying on the front right passenger seat.

Q. And within that jacket were there any pockets or compartments in that jacket in which a weapon could be placed?

A. There were two pockets, one on each side, one on the left and one on the right.

[12] Q. And were the pockets large enough that a firearm could fit in the pockets?

A. Yes. Yes.

Q. Did Officer Hadley participate in searching the vehicle at all?

A. He did.

Q. Did he search the area where you searched in the front of the vehicle?

A. I believe he searched on the driver's side of the vehicle.

Q. What was your purpose in conducting the search of the passenger compartment of the vehicle?

A. For one, to safeguard any property that was in the vehicle prior to the vehicle being towed off by the impound and tow service. And second of all, the way he was acting – he refused lawful orders to keep the jacket on – I thought that maybe there was something in that jacket would be of – be a safety concern to myself or another officer.

Q. And did you find anything in the jacket?

A. I did. I located a black pistol. Revolver.

Q. I'm showing you on the screen Government's Exhibit #1 for identification. Do you recognize what that photo is of?

A. Yes, I do.

Q. And what is it?

A. That's the pistol that I recovered. It had some black tape around the handle. I specifically remember the – the four [13] shells and one empty casing that I removed from the revolver barrel.

Q. Does this – does this photo appear to be a picture of the pistol that you removed from the jacket?

A. Yes, it is.

Q. And is there anything distinctive about the bullets that makes you remember them as being the same bullets you removed from the firearm?

A. Yes. I was commenting to our investigator after I turned it over to him why somebody would cut the tips off the lead. I've never seen that. That kind of made it distinctive on why those would be altered that way.

Q. Is this photograph an accurate picture of the gun and the bullets?

A. Yes, it is.

MR. SHEPHERD: Your Honor, the government would move to admit Government's Exhibit #1.

THE COURT: Objections?

MR. VAN HEEST: No objection, Your Honor.

THE COURT: Admitted.

Q. What happened to the vehicle at the conclusion of this traffic stop?

A. The vehicle was impounded.

Q. And why was that?

A. That's part of our SOP. Anytime someone's arrested out of [14] vehicle, that vehicle will be inventoried and impounded.

Q. Were all of the occupants of that vehicle arrested on this occasion?

A. Yes, they were.

Q. If you hadn't arrested Mr. Davis, would you have allowed him to drive that vehicle away?

A. No, I wouldn't have. He was obviously drinking alcoholic beverages. I wouldn't – matter of fact, I wouldn't even have left him walking. I would have had somebody come and pick him up.

Q. In a situation like that, is there any – is there any circumstance in which you would let somebody else drive the vehicle away?

A. If there were a family member present in that vehicle at the time of the stop, according to SOP.

Q. And was there anyone present on this occasion?

A. No, there was not.

THE COURT: So it was just Davis and the driver?

THE WITNESS: Yes, sir.

Q. And who was the driver?

A. Stella Owens.

Q. The – based on – talking about your prior experience, have you ever encountered situations where suspects had firearms in the pockets of their jackets?

A. On occasion, yes.

[15] Q. Have you ever encountered firearms during a traffic stop?

A. Yes, I have.

Q. And approximately how many traffic stops would you say you've made in your career?

A. Approximately – thousands during the six years that I've worked at Greenville.

Q. And would you say you've found a firearm during these traffic stops on more than one occasion?

A. More than one occasion, yes.

Q. Would it be a lot? Approximately how frequently?

A. I'm not sure. I know I've come across weapons in vehicles before. I couldn't put a number on it.

Q. During a traffic stop such as this, what is your first concern as a police officer?

A. Safety. Officer safety, always.

Q. In the search that you were conducting, what was your first concern when you were looking inside the vehicle?

A. The – trying to find out why he kept putting his hand in his pocket after numerous attempts to tell him to keep his hands out of his pockets. I thought there was some – there was some sort of illegal activity going on with him inside that vehicle, whether it be a weapon or narcotics, some sort.

Q. I'm showing you on the screen Government's Exhibit #2, and I'll rotate it here so you can see it a little better. Do you recognize this?

[16] A. Yes, I do.

Q. What is this?

A. That is a state citation. A ticket.

Q. And who was it issued to?

A. Stella Owens.

Q. And who issued this ticket?

A. Officer Hadley.

Q. Was this issued on April 27th, 2007?

A. Yes, it was.

Q. And what was this issued for?

A. DUI.

Q. Is this ticket the basis on which Ms. Owens was arrested?

A. Yes, it was.

MR. SHEPHERD: Your Honor, the government moves to admit Exhibit #2.

THE COURT: Objections?

MR. VAN HEEST: No objection, Your Honor.

THE COURT: Exhibit #2 is admitted.

Q. When you arrested Mr. Davis, did you also fill out an Alabama Uniform Arrest Report?

A. Yes, I did.

Q. Showing you now what's been marked as Government's Exhibit #3. Showing you #3, do you see that report?

A. Yes, I can.

Q. And do you recognize this item?

[17] A. I do.

Q. What is this?

A. It's an arrest report.

Q. And is this the arrest report you filled out in regards to Mr. Davis?

A. It is.

Q. Did you personally fill this report out?

A. I did.

Q. And is this your handwriting on this report?

A. It is.

MR. SHEPHERD: Your Honor, the government moves to admit Exhibit #3.

MR. VAN HEEST: One moment, Your Honor.

(Brief pause)

MR. VAN HEEST: No objection, Your Honor.

THE COURT: #3 is admitted.

Q. Taking a look at this report, does it list the reasons why you arrested Mr. Davis?

A. Yes, it does.

Q. And what are the reasons listed on the report for arresting Mr. Davis?

A. Giving a false name to a law enforcement officer, failed to appear on a DUI warrant, and also certain persons forbidden to possess a weapon.

Q. The failure to appear on a warrant, is that a warrant that [18] was outstanding on April 27th, 2007?

A. Yes, it was.

Q. Were you aware of that warrant when you first arrested Mr. Davis?

A. No, I was not.

Q. When did you become aware of that warrant?

A. After he was already booked into the county jail, I ran his name through our police dispatch. And it was found that at that time he had an outstanding warrant for DUI.

Q. And the certain-persons-forbidden-to-possess charge, when did you develop information that that charge applied as well?

A. After the investigator had pulled his criminal history.

Q. And what is that charge, specifically?

A. It basically says any person that is a habitual drunkard or a narcotics abuser cannot possess a weapon.

Q. And what information did you have that the defendant qualified?

A. Distribution of narcotics, controlled substance.

Q. Had he been previously convicted?

A. Yes, he has.

Q. And finally, does it indicate on this form anywhere whether you suspected him of being under the influence of alcohol?

A. Yes. Condition of arrestee, I checked the block where it says he was drunk by the smell of alcoholic beverages on his breath and the way he was speaking.

[19] Q. Would that be block 36 of this form?

A. It's kind of hard to see.

Q. Let's see if I can zoom in.

A. Yes. Block 36.

Q. Finally, just so we have the order of events correct, the – when you first arrested Mr. Davis, had you searched the vehicle at that time?

A. No.

Q. And where did you place Mr. Davis when you placed him under arrest?

A. I placed him in the back of my patrol car.

Q. And that was for what charge at that point?

A. Giving a false name to a law enforcement officer.

Q. Was Ms. Owens, the driver, under arrest at that stage?

A. Yes, she was. She was.

Q. And had Officer Hadley searched the car yet?

A. No. It hadn't been touched.

MR. SHEPHERD: Your Honor, may I have one moment?

THE COURT: Yes, you may.

(Brief pause)

Q. Did you inquire of the driver what the name of the passenger was at all during this traffic stop?

A. I don't – I don't remember.

Q. And at any point did Mr. Davis admit to you that he had been convicted of any felonies?

[20] A. No. After he was out of the vehicle, after I placed him under arrest for giving a false name, he didn't have anything to say at all.

Q. And again, what was the basis for arresting him for providing a false name?

A. Giving a false name to law enforcement.

Q. And what was your basis for believing that he had just done that?

A. He had give me a false name of Ernest Harris.

Q. And how did you determine that was a false name?

A. By checking his -- his data through 911 and verifying that was him.

MR. SHEPHERD: Your Honor, the government has no further questions at this time.

THE COURT: When you did – when you verified it through 911, did it give you a photograph or identifying information for you to be able to determine he was in fact someone other than the person he described himself to be?

THE WITNESS: It gave his date of birth and Social Security number. It doesn't provide any kind of photos. We don't have computers in our vehicles.

MR. SHEPHERD: Your Honor, may I ask a follow-up question?

THE COURT: Yes.

Q. You said earlier the name he originally gave you was Ernest [21] Harris?

A. Yes, sir.

Q. Did you run that name through the 911 system first?

A. I – I think I did. I'm not sure. I'm not sure if I did or not.

Q. Have you since determined who an Ernest Harris is in relation – of any relationship to the defendant?

A. No.

Q. And I think earlier you said that there were people in the area who were telling you that he wasn't Ernest Harris?

A. Right.

Q. What exactly were you told?

A. They stated that that's – they said that's Willie, Willie Gene, Willie Gene Davis.

Q. And did you take any written statements from those –

A. No.

Q. – people?

A. They walked off down the street. I don't know where they were coming from or where they were going. There was a large group of people on the other side of the street from where the traffic stop was taking place.

Q. When you – when you provided the information to 911, you say it came back with a date of birth?

A. Right.

Q. Was that date of birth consistent with the age that the [22] passenger appeared to be?

A. Yes.

MR. SHEPHERD: Nothing further, Your Honor.

THE COURT: And officer, describe the area where the arrest took place.

THE WITNESS: It was a residential area near a T intersection. There's a church across the street. I believe it was on the left-hand side.

THE COURT: And did you have concerns, if he did have a weapon, for the safety of the people in the area if he were to have had a weapon and was – you said he was fidgeting with his jacket.

THE WITNESS: Yes, sir.

THE COURT: Did you have concerns if he pulled out a weapon for the safety of the people walking by?

THE WITNESS: Most definitely Myself and the other officer, yes.

THE COURT: All right. Any questions based on that?

MR. SHEPHERD: No, Your Honor.

THE COURT: Any questions – any cross?

MR. VAN HEEST: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. VAN HEEST:

Q. Sergeant Miller, in your six years and two months of police work, you've made a lot of arrests, you said, right?

[23] A. Yes, sir.

Q. And a lot of them have been based on traffic stops?

A. Warrants. Traffic stops.

Q. And you also have experience in the military police segment of the U.S. Air Force, right?

A. Right.

Q. And you would agree that the – that there are different sets of laws, correct?

A. There are.

Q. And, in fact, the Fourth Amendment does not extend as far in the Air Force as it does in the – in civilian life, correct?

A. That's safe to say that, yes.

Q. But you said you did go through POST training, right?

A. Yes.

Q. And in POST training, they do teach you about arrests and search warrants and the Fourth Amendment, correct?

A. Yes. It was limited.

Q. But they tell you about –

A. They – they do.

Q. Okay. Well, you're taught about protective sweeps, right?

A. Right.

Q. And searches incident to arrest, right?

A. Right.

Q. Inventory searches, right?

A. Yes.

[24] Q. And there are differences among them, right?

A. Yes.

Q. And there are other types of searches that you can have that are warrantless as well, right?

A. Right.

Q. And obviously, you know you have to do other things in order to get a warrant to search, correct?

A. Right.

Q. Not every arrest allows you to search, correct?

A. Such as?

Q. Well, just because you arrest somebody doesn't mean that you have an unfettered right to search. It's still limited, correct?

A. I'm not understanding your question.

Q. Well, let me move on, then. You are also taught in POST training report writing, right?

A. Yes.

Q. And the purposes of report writing?

A. Right.

Q. And you said you're a sergeant, right?

A. Yes.

Q. Okay. You got to be a sergeant by moving up the line. You didn't start there, right?

A. Right.

Q. And that's because you're a good officer, right?

[25] A. I like to think I am.

Q. And as a good officer, you need to understand that you need to write full and solid and complete reports, right?

A. Yes.

Q. And one of the reasons for that is because when you write a report, it's going to be seen by a supervisor, right?

A. Yes.

Q. And, in fact, when Officer Hadley writes a report, it's going to be seen by you, correct?

A. Yes, that's correct.

Q. So you have both – the benefit of having seen it from both ends, actually, as a supervisor and filling it out for someone else, right?

A. Right.

Q. You also know that your report is going to be provided to a prosecuting agency, whether it's federal or state, right?

A. Yes, I do.

Q. And you also know that your report is ultimately going to end up in the hands of somebody in the defense business, correct?

A. Quite possibly, yes.

Q. And as a result of that, you're going to probably be questioned about it, right?

A. Yes.

Q. Okay. I'm going to have some questions for you about that.

[26] A. Okay.

Q. And for that reason, you are as complete as possible, right?

A. Yes.

Q. And you are as accurate as possible.

A. Try to be.

Q. And you are as technically correct as possible, correct?

A. Yes.

Q. You don't want to say something that you know to be wrong, right?

A. Yes.

Q. And you do want to say everything that you think needs to be said in order to –

A. Right.

Q. – substantiate the report correctly.

A. Yes.

Q. Now, let me back up to your arrival at the scene. When you arrived at the scene, Officer Hadley was already there, correct?

A. Yes.

Q. And at the time you arrived at the scene, Officer Hadley was at the driver's side, right?

A. Yes. He was speaking with the driver.

Q. Was the driver in the car or out of the car?

A. The driver was in the driver's seat.

Q. Okay. And there was another passenger in the seat, correct?

A. Yes, there was.

[27] Q. Before you arrived at the scene, you knew there was a passenger in the car, correct?

A. No, I did not.

Q. Officer Hadley had not radioed you?

A. No.

Q. Now, when you arrived at the scene and Officer Hadley was there, was there anybody else from law enforcement there at that time?

A. No. It was just Officer Hadley.

Q. But later on another officer arrived, correct?

A. Yes.

Q. And that was somebody from the Butler County Sheriff's Office?

A. I don't remember that. I remember pulling my car up behind his and walking to the driver's side – or the passenger side of the car.

Q. When you say pulled your car up behind his, is this Officer Hadley's or somebody else's?

A. Officer Hadley's car.

Q. Okay. But you do know that other law enforcement arrived before the end of this stop, correct?

A. I don't – I don't remember. I just remember arriving there myself.

Q. Do you remember a Butler County sheriff's officer named Deputy Williams?

[28] A. Williams.

Q. Josh Williams?

A. Josh Williams. I know Josh.

Q. Okay. Was he there?

A. I don't remember.

Q. Well, do you recall whether anybody other than yourself and Officer Hadley were there during the entire time of this – of this stop?

A. I don't – I don't remember.

Q. I'm not asking you who. I'm just – whether there was anyone.

A. Like I said, I don't remember.

Q. Ultimately, you put Mr. Davis into your car; is that right?

A. Yes.

Q. And you said that Officer Hadley – well, Officer Hadley put Ms. Owens in his car?

A. After she was arrested.

Q. Correct. Yes. Who went into the car first, Ms. – who went into their – well, let me ask you this. Who was handcuffed first, Ms. Owens or Mr. Davis?

A. Ms. Owens.

Q. Okay. At the time that Ms. Owens was handcuffed, that was after she had failed a field sobriety test, correct?

A. Yes.

Q. During the time she was taking the field sobriety tests, you [29] were standing with Mr. Davis, correct?

A. Yes, I was.

Q. And that was at the rear of the vehicle, right?

A. No. That was at the passenger side of the vehicle where he was sitting.

Q. He was still sitting in there?

A. He was still sitting in the vehicle.

Q. And he was fidgeting, you said, in his pocket?

A. He – he was attempting to put his hand in his pocket, in the jacket pocket, yes.

Q. And you had asked him not to do that?

A. Yes, I did.

Q. And he continued to do it anyway?

A. Yes. I believe he did it one more time.

Q. And you did not take him out of the car initially at that point; is that right?

A. No. No, I did not.

Q. Okay. And you didn't draw your weapon, correct?

A. No. I don't recall drawing my weapon.

Q. Okay. And there was nobody else in the way of law enforcement standing next to you at the time, correct?

A. I don't remember anybody standing next to me. It was myself by the passenger side of the vehicle.

Q. There was nobody other than you watching – in the way of law enforcement watching Mr. Davis in the car, correct?

[30] A. Right. Right.

Q. Now, you stated that Officer Hadley told you that he stopped the vehicle for loud noise, right?

A. Right.

Q. And that he thought the driver was DUI?

A. Right.

Q. Is that when he radioed you or when you – at what point did you determine –

A. That was – that was after I arrived on the scene with him.

Q. That was after he had already been interviewing Ms. Owens, correct?

A. Yes.

Q. So it was nothing from Ms. Owens' driving that led Officer Hadley to believe she was drunk, correct?

A. I don't – I don't remember that. He stated that he stopped her because of the loud music and he smelled alcohol on her breath.

Q. Okay. And you said that you go to all your officers' traffic stops while you're on duty.

A. I try to.

Q. Whenever you're available.

A. Like I said, I try to.

Q. Well, obviously –

A. If I'm not busy –

Q. Right.

[31] A. – I'm heading that way.

Q. So you weren't going to the scene here because of any specific danger specific to this situation.

A. No. I didn't know that he had a DUI at that time until I had pulled up. Like I said, I go there as a – as a backup for my officers.

Q. All you knew was it was a traffic stop.

A. Yes.

Q. Okay. And as you said, you go to all the traffic stops.

A. I try to.

Q. And that's just as a general protection –

A. Yes.

Q. – and backup.

A. Right.

Q. So it's not anything specific to any particular case.

A. No. No.

Q. Now, at what point did you take Mr. Davis out of the car with relation to what was going on with Ms. Owens with the – and Officer Hadley?

A. He was not removed from the vehicle until after she was arrested. She was already placed in handcuffs.

Q. Okay. And was she already in – you said she was placed in handcuffs. Was she kept outside or was she immediately placed into Officer Hadley's vehicle?

A. He – after he arrested her and placed her in handcuffs, he [32] put her in the back of his vehicle.

Q. Okay. At that point, you then asked Mr. – or directed Mr. Davis to step out of vehicle?

A. Yes, sir.

Q. And you then took him to the rear of the vehicle; is that correct?

A. I took him off to the side of the vehicle. He was still in between the vehicle and the open car door at that time when he got out of the vehicle.

Q. Okay. At some point, did you take him to the rear of his – of the vehicle he was in?

A. After the pat down was completed.

Q. After the pat down of himself.

A. Weapons pat down. Right.

Q. Okay. And at this point, Ms. Owens was already in the car – in Officer Hadley's patrol car.

A. Yes.

Q. Where was Officer Hadley at the time?

A. I don't – I don't remember where he was at at the time, whether he was behind the car.

Q. Was he there to assist you at that time?

A. I don't remember. I don't remember where he was standing.

Q. So you – you patted down Mr. Davis as soon as he had stepped out of the car, right?

A. Yes.

[33] Q. And then you walked Mr. Davis to the back, to the rear –

A. To the rear of the vehicle.

Q. – of Ms. Owens' vehicle, correct?

A. Right.

Q. And if you will, my questions tend to be a little bit long. I'd ask if you would stop – let me finish the question so that the court reporter can get it all down, okay? Thank you.

Now, Mr. Owens was standing at the back of the vehicle, then, and you are standing with him, correct?

A. Mr. Davis.

Q. I'm sorry. Mr. Davis. Is that correct?

A. Yes.

Q. And at that time when he first arrived at the back of the vehicle after you had patted him down to the side of the vehicle, what did you believe his name to be at that time?

A. Ernest Harris.

Q. Okay. So you did not know his name to be Willie Davis.

A. Right. Not at that time.

Q. And you did in fact run a check on an Ernest Harris to determine whether there was a warrant; is that right?

A. After he was placed under arrest. After he was already in the jail. I had no idea that he had an outstanding warrant.

Q. No. Under the name Ernest Harris. You didn't check for Ernest Harris until after he was in the jail?

A. No, no. I didn't check under Ernest Harris, no.

[34] Q. Did you check under Ernest Harris at any time?

A. No. I don't remember doing that.

Q. Did anybody check under Ernest Harris, as far as you know?

A. As soon as he got to the back of the car – he led me to believe by his – by the way he was talking and hesitation, I believed he was lying to me. I had no – no proof of who he was. So I had asked some – some people walking by if they knew who he was, and they said it was Willie Gene Davis.

Q. You said there was people walking by. Was there a big crowd gathered or were there just people walking by?

A. There was – there was a crowd. I don't know where they were coming from or where they were going.

Q. Did that crowd make you feel uncomfortable – you and Officer Hadley feel uncomfortable and to have concern for your safety?

A. Not at that time. I mean they weren't yelling or anything. They were standing on the sidewalk, I believe.

Q. So then at what point exactly did you place Mr. Davis in handcuffs?

A. After they told me what his name was, I checked that name through our dispatcher and found out that – that he had – that was his birthday. His birthday and Social Security matched that – that name of Willie Gene Davis.

Q. Okay. And at that point, Mr. Davis was at the rear of the vehicle. That's where you placed him in handcuffs.

[35] A. At that time, yes, he was.

Q. Right. And you had not checked anything in the car yet at that right – at that point?

A. I had – at that point, we didn't touch the car yet.

Q. And Officer Hadley had not either, correct?

A. No. That's right.

Q. And this is all after Officer Hadley had already placed Ms. Owens in the police car?

A. Yes.

Q. So Officer Hadley was available to do other things at this point, correct?

A. He – I'm sure he was. I don't know where – I don't know where he was at that point. He wasn't standing around me. At least I don't remember that.

Q. And he wasn't checking the car.

A. No. I don't think he was doing that.

Q. When you placed Mr. Davis into handcuffs, you then placed him into your vehicle?

A. My patrol car.

Q. Right. And this crowd was still milling around at this point; is that right?

A. They – they were there. I saw them move off down the street.

Q. So once the two individuals, both the driver and the passenger of this car, this vehicle, were in handcuffs in patrol [36] cars, at that point is when you decided to search the vehicle, the vehicle of Ms. Owens; is that correct?

A. We decided to do an inventory search due to the arrest, yes.

Q. Okay. That's the point that you decided to make that –

A. Yes.

Q. – to do that search, correct?

A. Yes.

Q. Okay. And you said that was an inventory search due to arrest, correct?

A. Inventory search. Right.

Q. And you also said that you – well, let me ask you. What was the first thing you searched when you went into the vehicle?

A. The jacket sitting on the passenger seat.

Q. And you had said you thought there could be a weapon or narcotics in there; is that right?

A. Possibly.

Q. Well, I mean that is what you said a little while ago.

A. Right.

Q. And you were searching for either a weapon or narcotics, you thought, then.

A. Something – something.

Q. Right.

A. I wanted to find out the reason why he kept putting his hand in his pocket.

Q. Okay. It wasn't that you felt that there was a gun or saw [37] what you thought was a gun, correct?

A. I didn't see a gun at that point.

Q. And you said that you went directly to that jacket because of a safety concern, right?

A. Right.

Q. And that was the safety for the officers, correct?

A. Officer safety. Right.

Q. And that is despite the fact that both persons who are in the vehicle were now in separate vehicles and in handcuffs.

A. They were in separate vehicles. Right.

Q. Okay. So they certainly didn't pose any realistic attack to your safety, correct?

A. No. No.

Q. So it was more inventory than for officer safety.

A. Yes.

Q. In fact, it really wasn't for officer safety at that point.

A. Not at that point. I mean they were both in handcuffs in the rear of our patrol cars. We had to perform the inventory search to impound the vehicle.

Q. So when you talked earlier about the purposes of the search being inventory before impound and something in the jacket being a safety concern, there was – it was only for inventory before impound, correct?

A. Right.

Q. There was no safety concern.

[38] A. Well, there's always a safety concern. If there's a gun in the vehicle, that needs to be documented. That needs to be taken into our custody.

Q. But it was not a safety from these two individuals?

A. I had no idea that there was even a gun in the car at that point. I knew something – there was a reason why he kept putting his hands in his jacket.

Q. And you understand that under the law when somebody is arrested in a vehicle, you can search – incident to that arrest, you can search the entire passenger compartment of the vehicle, right?

A. Yes. Yes.

Q. And you were taking advantage of that situation as well, correct?

A. No. I was performing my job.

Q. Well, when I say taking advantage of that, you were taking advantage of what the law allows you to do, correct?

A. I was doing my job according to what the law allows me to do.

Q. So you'd agree that's a yes, then, right?

A. Yes.

Q. Now this was not any kind of a protective sweep from Mr. Davis, though. Mr. Davis was already in –

A. He was already in handcuffs.

Q. Okay. Now, you did not place Mr. Davis in handcuffs when [39] you initially took him out of the car, correct?

A. Correct.

Q. Because he did not pose any kind of a threat to you, correct?

A. At that point, no.

Q. If he had have posed a threat, you would have put him in handcuffs just temporarily.

A. Right.

Q. And you didn't do that.

A. (Shakes head)

Q. I'm sorry. You –

A. No.

Q. Now, you had talked about a failure-to-appear warrant on the arrest report –

A. Right. Failure to –

Q. – that Mr. Shepherd showed you?

A. Yes.

Q. Failure to appear on a DUI?

A. Yes.

Q. Okay. When you ran a – you ran a record check on Willie Gene Davis while you were still on the scene, though, didn't you?

A. I didn't run a record check. I ran his – his name.

Q. To determine whether or not he had a felony?

A. To determine if that was his identity. I did not check it [40] for any kind of active warrants until he was already in jail.

Q. Okay. So that was not – that failure to appear on a DUI was not the basis for any arrest –

A. No, it was not.

Q. Okay.

A. No, it was not.

Q. Would you agree, then, that if you had not arrested him on the scene for any other reason, you would have probably not even discovered that?

A. That's true.

Q. And you wouldn't have gone back and decided let me just take a look; before this guy is going to be let go, let me get a records check.

A. True.

Q. And you mentioned something about arresting him for certain persons forbidden because – what was the reason that you said certain persons are forbidden from carrying a pistol?

A. Possess a pistol. Right.

Q. Right. Certain persons are forbidden from possessing a pistol because they're drunkards or narcotics users? That was the basis for that arrest?

A. Right.

Q. And you said that was because he had told you something about distribution?

A. That's – that was what was determined after his criminal [41] history was pulled, right.

Q. Okay. Somebody who's –

A. Originally, I charged him with carrying a pistol without a permit, I believe it was. And then after speaking with an investigator after this – after he was arrested, it was determined that we can charge him with that based upon his criminal history.

Q. Okay. The investigator you spoke to, was that a local person?

A. Randy Courtney, county –

Q. Okay. So he'd be local. So at that point, you never actually did charge him with carrying a pistol without a permit, correct?

A. No. It was written down – written on one of the reports, and it was subsequently changed after we discovered what his criminal history was.

Q. Okay. Now, I want to show you Defendant's exhibit #1.

(Brief pause)

MR. VAN HEEST: Your Honor, may I approach the witness?

THE COURT: Yes, you may.

Q. Sergeant Miller, this is the Alabama Uniform Incident and Offense Report. Do you recognize that –

A. I do.

Q. – that particular report?

A. Yes.

[42] Q. Is that one that you completed?

A. Yes.

Q. Okay. It has your signature on the second page; is that right?

A. Yes.

Q. At the time, you were a corporal?

A. Yes.

Q. And that's your handwriting writing up all the rest of it, correct?

A. Yes.

Q. Everything except the watch commander down at the bottom of page 2, right?

A. Yes.

Q. And that was who you submitted this to.

A. Yes.

Q. Now, this is a different document than what Mr. Shepherd showed you earlier, right?

A. It appears to be the same one.

Q. Well, what he showed you earlier is the arrest report. Is that not correct?

A. Yes, he did.

Q. Okay. This is the incident/offense report, sometimes referred to as an I and O report.

A. Right.

Q. And they're actually two different – two different reports, [43] correct?

A. Yes.

Q. Would you explain what the difference between those reports is.

A. An arrest report is basically all the – the person's data and the charges that you are charging them with. The incident arrest report is the narrative of the charges.

Q. So it being the narrative, that's where you put the details in, correct?

A. Yes.

Q. And that would be the details we talked about earlier, right?

A. Yes.

Q. About being complete, right?

A. Yes.

Q. And accurate, right? I'm sorry. Right?

A. Yes.

Q. And making sure you use all the correct terms, correct?

A. Yes.

Q. Okay. I want you to take a look at the narrative and explain – and see if you can find in there where you talk about this being an inventory search.

A. It's not on there.

MR. VAN HEEST: Okay. And at this time, Your Honor, I'm going to move to offer Defendant's Exhibit #1.

[44] THE COURT: Objection?

MR. SHEPHERD: No objection.

THE COURT: Admitted.

MR. VAN HEEST: And Your Honor, I'm going to put it on the screen for the Court's benefit as well at this time.

Q. It's not in there. That's correct?

A. Yes. That's true.

Q. There's nothing mentioned about search incident to an arrest being on there either, is there?

A. Right.

Q. There's also nothing in there about a protective sweep of the vehicle, correct?

A. Right.

Q. And there's nothing in there about there being any search to protect the safety of the officers, correct?

A. Right.

Q. Now, anytime that you inventory a vehicle, that's because you're about to impound it, correct?

A. Yes, sir.

Q. And that's a standard procedure, right?

A. Right.

Q. And when you impound a vehicle, you have to have – there's a certain process that you have to go through, right?

A. Yes.

Q. You have to call the tow – the wrecker.

[45] A. Yes.

Q. Right. And have it – have the vehicle carried somewhere else, right?

A. Yes.

Q. Do you normally do your inventory search on the scene or at the location?

A. On the – on the scene.

Q. Always?

A. With the exception of – in my experience, yes, always right there at the scene. We don't remove the vehicle and have it inventoried somewhere else.

Q. Right. And when – now, did you say you waited on – did you wait on scene for the wrecker to come?

A. Yes.

Q. So it wasn't until the wrecker came that anybody left, that anybody went to the jail; is that right?

A. That – as best I can remember, yes.

Q. Okay. But at that point, the time the wrecker had arrived, you had already done the search of the vehicle, right?

A. The vehicle –

Q. The passenger compartment of the vehicle.

A. The vehicle was inventoried, as best as I can remember.

Q. Inventory searched. Is that right? By inventory, you mean you went through it and searched.

A. We went – we went through and inventoried all the property [46] that was in the vehicle, in the compartment.

Q. Did you prepare a report of inventory?

A. The inventory was prepared. I don't have a copy today.

Q. Okay. Do you know whether one was submitted to Mr. Davis?

A. No. We don't – we don't submit any kind of inventory to the defendant. It gets logged at the police department.

Q. And it's never provided to the defendant?

A. No.

Q. What about to Ms. Owens? She wouldn't have gotten one either?

A. No.

Q. Well, isn't the purpose of the inventory also to document – and let me finish this question. Isn't the purpose of an inventory to document the items that are found in the vehicle so that if there's ever a claim by the passenger or owner or driver of the vehicle that such and such was there, that that would

be something that you'd have a record of? Isn't that correct? That's the purpose?

A. That's the purpose, to safeguard their – their items in the vehicle, yeah.

Q. And – but you don't even tell them what items that you're safeguarding, that you've identified?

A. No. No. We write them on an inventory sheet.

Q. And then hold that yourself, but don't provide it to the defendant?

[47] A. That's right.

Q. And you said one was prepared?

A. Yes.

Q. Do you know if anything else was documented on –

MR. VAN HEEST: Well, let me – let me scratch that question.

Q. Was – the gun that Mr. Shepherd showed you the photo of, was that documented on an inventory form?

A. I don't have the – the inventory form on – with me, so I can't say. The – the pistol that was – that I recovered is listed on the offense report.

Q. I know it's listed on the offense report because it's part of the offense, correct?

A. Right.

Q. But you don't know whether it's on an inventory report.

A. I don't – I don't know. It should have been.

Q. But you don't know whether it is.

A. I don't know.

Q. What about the jacket?

A. The jacket would have been also.

Q. Would have been on the inventory report?

A. The inventory, right.

Q. Do you know whether that jacket was given back to Mr. Davis?

A. The jacket would have stayed with the vehicle. I don't remember – as far as I can remember, the jacket still was in [48] the vehicle.

Q. Is the jacket still in the property of the Greenville Police Department?

A. No.

Q. Do you know where it is now?

A. No. I don't know.

Q. Do you know what happened to it?

A. It would have stayed with the vehicle. The owner – if the owner got out of the jail, the owner

would have went and got the vehicle, and it would have stayed with the vehicle.

Q. And when the owner gets the vehicle, they don't get a report of the inventory; is that correct?

A. If they ask for one, I'm sure they can get one. I've never come across that.

Q. And your standard operating procedures don't require you to provide this record to the person who was –

A. No.

Q. Let me finish the question. – to the person whose vehicle you are impounding?

A. No.

Q. At some point in this case this arrest went into the Butler County court system, correct?

A. Yes.

Q. Okay. And that was based upon the failure – the false name to a law enforcement officer, correct?

[49] A. Yes.

Q. And also the carrying of pistol – certain persons forbidden from carrying a pistol, correct?

A. Yes.

Q. That case was ultimately dropped, right?

A. I don't know if it was or not.

Q. Well, then, but you do know – you'd agree with me that the gun part of the case has gone to federal court now, right?

A. Yes.

Q. And that's what we're doing here, right?

A. Yes.

Q. So you knew that the case was going to go federal at some time before it happened, right?

A. It – yes.

Q. And in – in the process of the case going federal, you had conversations with Mr. Shepherd and other federal prosecutors, correct?

A. The only one I spoke with, I believe, is Mr. Shepherd.

Q. Never spoken with Mr. Hardwick?

A. I remember seeing a subpoena with his name on it. I don't – I don't recall talking to him.

Q. That's actually Ms. Hardwick. It's Tommie, but Ms. Hardwick.

A. Okay. I'm sorry.

Q. What about any agents from Alcohol, Tobacco, and Firearms?

[50] A. Yes.

Q. Did you speak with Ms. McNeil right here?

A. Yes.

Q. Okay. And you would have spoken to her several weeks after the event happened, correct?

A. Yes.

Q. And you provided her information about what happened on the arrest, correct?

A. Yes, I did.

Q. Was that statement taped? Did she tape the statement that you gave?

A. I don't – I don't remember.

Q. Did you handwrite anything to her?

A. No. She just asked me some questions, and she handwrote those.

Q. Let me show you a report and ask you whether you've ever seen it before.

MR. VAN HEEST: Your Honor, may I approach?

THE COURT: Yes, you may.

MR. VAN HEEST: Defendant's Exhibit #2.

Q. Is that document marked Defendant's Exhibit #2 down at the bottom?

A. Yes.

Q. And does it identify itself as a report of investigation at the top?

[51] A. Yes.

Q. Have you ever seen this before?

A. No, I have not.

Q. Okay. I want you to take a quick read of what's in here and ask if it refreshes your memory about any of the questions that I asked you or that Mr. Shepherd asked you that you couldn't remember.

A. Okay.

Q. And just read it to yourself and let me know when you're done.

(Brief pause)

A. Okay.

Q. In looking at that report, does that refresh your memory on any of the question – on anything?

A. No.

Q. So in seeing that number six where it says Officer Miller requested –

MR. VAN HEEST: Actually, Your Honor, may I – I move to admit this document.

THE COURT: Any objections?

MR. VAN HEEST: And he's not remembered it, but I think the rules of evidence are a little more lax in suppression hearings.

THE COURT: Any objection?

MR. SHEPHERD: Your Honor, I was going to object just [52] for the reason that he didn't remember this document, didn't prepare it. I do agree that the rules are more relaxed. So I would object, through this witness, admission of this document.

MR. VAN HEEST: Your Honor, I'll be glad to just question him based on the document. I was just going to do that for the Court's ability to see – put it on the screen and see it.

THE COURT: Go ahead, then.

MR. VAN HEEST: But I'll just go ahead and question him.

Q. In number six, it states that Officer Miller requested Mr. Davis to stand near the rear of the vehicle with Butler County Sheriff's Deputy Josh Williams. Do you see that?

A. Right. I do.

Q. Do you recall now whether Josh Williams was there or just draw a complete blank on it?

A. No, I don't. I don't remember.

Q. Okay. And – well, from what's in here from what you do recall, do you recall saying those things to Agent McNeil?

A. I remember briefly going over what – what happened. I don't remember specifics.

Q. Okay. Well, do you recall whether you ever used the term "search incident to arrest" to Ms. McNeil?

A. I don't remember.

Q. And you would agree in looking at that – that document that [53] there's nothing in there about search incident to arrest, correct?

A. I don't – I don't see anything.

Q. Okay. You would – do you recall ever telling Agent McNeil anything about a protective sweep of the vehicle or the passenger compartment of the vehicle?

A. I don't remember.

Q. And you'd agree by looking at that in the report that there's nothing about a protective sweep in there, correct?

A. Right.

Q. And do you recall ever mentioning anything about an inventory search of the vehicle to Agent McNeil?

A. I'm not – I'm not sure. I don't remember.

Q. And you would agree from looking at the report that there's no mention of an inventory search being conducted in this; is that correct?

A. Right.

Q. And do you recall telling Agent McNeil anything at all about impounding the vehicle?

A. Yes. I do remember the – talking about a vehicle being impounded.

Q. Okay. Well, I want you to take a look. And do you see anything in that report about the vehicle being impounded?

A. No.

Q. In looking at your own report, Defendant's Exhibit #1 –

[54] MR. VAN HEEST: Well, let me scratch that completely.

Q. Do you recall whether you told Agent McNeil that you queried NCIC through your dispatcher on the name Ernest Harris?

A. No. I don't remember that.

Q. Okay. You see it in the report under paragraph four, though, correct?

A. Right. I see that.

Q. Okay. You don't know where she got that from?

A. I don't – I don't remember that at all.

Q. But you certainly could have told her that?

A. I could have. Right.

Q. If you had told her that, would it be the truth? Would it be accurate?

A. Yes. That – that would probably be accurate, yeah.

Q. So, in fact, you did query NCIC through your dispatcher under the name Ernest Harris, then.

A. I'm – I'm sure I did. I don't – I don't remember.

Q. And that would have been done while you were on the scene, though, right?

A. Yes. That would have been done on the scene.

MR. VAN HEEST: Okay. I have already moved Defendant's Exhibit #1 in; is that right?

THE CLERK: Yes.

MR. VAN HEEST: Thank you. Your Honor, may I approach the witness –

[55] THE COURT: Yes, you may.

MR. VAN HEEST: – and collect those documents? And Your Honor, I'm going to hand to the clerk Defendant's Exhibit #1 at this point.

THE COURT: Are you done, Mr. Van Heest?

MR. VAN HEEST: Oh, I'm sorry. Yes, Your Honor.

THE COURT: Any further direct?

MR. SHEPHERD: No, Your Honor.

THE COURT: You may step down.

Next witness, if any?

MR. SHEPHERD: None from the United States, Your Honor.

THE COURT: Do you have any witnesses?

MR. VAN HEEST: Yes, Your Honor. I'd like to call Agent McNeil.

(The witness is sworn)

THE CLERK: Have a seat, please.

SYBIL HALL-MCNEIL, the witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VAN HEEST:

Q. Agent McNeil, I'd like to show you an exhibit marked Defendant's Exhibit #2. All right?

MR. VAN HEEST: Your Honor, may I approach?

THE COURT: Yes, you may.

Q. Would you state for the record what your full name is, [56] please.

A. Sybil Hall-McNeil.

Q. And Sybil is S-Y-B-I-L?

A. Correct.

Q. And McNeil is M-C-N-E-I-L, or is it two Ls?

A. Correct. M-C-N-E-I-L.

Q. Agent McNeil, I've handed you what's been marked as Defendant's Exhibit #2. Do you recognize that document?

A. Yes, sir.

Q. And did you prepare that document?

A. Yes, sir.

Q. And what is that document called?

A. It's a report of investigation.

Q. Okay. And that is a Department of Justice, Alcohol, Tobacco, Firearms and Explosives document?

A. Yes, sir.

MR. VAN HEEST: Your Honor, I'd move at this point to admit Defendant's Exhibit #2.

THE COURT: Objections?

MR. SHEPHERD: No objection at this time.

THE COURT: Admitted.

Q. Agent McNeil, this report of investigation came from a conversation with Sergeant Miller, correct?

A. Correct.

Q. Okay. And the same Sergeant Miller who just testified a [57] little while ago?

A. Yes, sir.

Q. And you have been in the courtroom and you heard all that he testified to, correct?

A. Yes, sir.

Q. And it was based upon an interview with him, correct?

A. That is correct.

Q. Was it also based upon looking at any records that he had prepared, including the Uniform Incident and Offense Report?

A. My report was based off of speaking with him, not necessarily the report itself. I attached the report that he wrote as an attachment.

Q. So the paragraphs one through eight in the narrative section of the report are based upon your conversations with Sergeant Miller; is that right?

A. That is correct.

Q. And you have – in preparing this report, you are familiar with it and with its contents, correct?

A. Yes, sir.

Q. How long have you been an agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives,

regardless of whether explosives was in the name at the time?

A. Since October of '91, 1991.

Q. Were you in any other law enforcement agency before then?

A. I was a loss prevention security supervisor.

[58] Q. Okay. Did you have – in your loss prevention, was that in Alabama?

A. Yes, sir.

Q. Did you have to undergo any kind of training similar to a Peace Officer Standards Training?

A. We had training, but not the same level as a police officer training.

Q. Okay. Well, let's concentrate, then, on the last 16 years, shall we?

A. Yes, sir.

Q. You have undergone training with the Bureau of Alcohol, Tobacco and Firearms, correct?

A. That is correct.

Q. And within that training, you had to learn Fourth Amendment law as best as it can be learned, correct?

A. Yes, sir.

Q. And, in fact, you regularly get updates on it as the Fourth Amendment changes, correct?

A. That's correct.

Q. Well, the Fourth Amendment doesn't change, but as the interpretations change, correct?

A. I understand your question.

Q. Okay. And you also – so you are aware of different types of warrantless searches, correct?

A. Could you be specific, sir?

[59] Q. Well, you are aware that there are warrantless searches that are sometimes permitted or that involve vehicles, correct?

A. Yes, sir.

Q. And you are aware that there are warrantless searches that are sometimes permitted when somebody is arrested, as what's called a search incident to arrest, correct?

A. That's correct.

Q. And you are aware how that applies to vehicles, correct?

A. Yes, sir.

Q. You are also aware of what's called a protective sweep in law enforcement and in the law, correct?

A. Yes, sir.

Q. And you are aware that a protective sweep can be considered within the scope of vehicle stops; is that right?

A. Yes, sir.

Q. And you are aware of what's called an inventory search, correct?

A. I am aware.

Q. Okay. And an inventory search you understand to be something that is done before a vehicle is impounded, right?

A. Yes, sir.

Q. And often after somebody has been arrested, correct?

A. Usually in a search – a search is done after they are being arrested. Yes, sir.

Q. And certainly you have appeared as a witness in federal [60] court in criminal cases on hundreds of occasions. Would you agree?

A. Yes, sir.

Q. And so you understand the importance of report writing, correct?

A. Yes, I do.

Q. And you understand the need to get as much information as possible, correct?

A. Yes, sir.

Q. And you understood that Michael J. Durham was going to be reviewing this document, right?

A. Yes, sir.

Q. And you also understood that somebody from the United States Attorney's Office for the Middle District of Alabama was going to be reviewing the document, right?

A. I knew that as well.

Q. In fact, you're the case agent in the case, right?

A. Yes, sir.

Q. And that means as one of your duties you actually presented the case to the government – to the United States Attorney's Office; is that right?

A. Yes, sir.

Q. And you also understood, certainly, that somebody like myself, a defense attorney, was going to get a copy of this document, right?

[61] A. Yes, sir.

Q. And that you would be questioned about it, right?

A. That is correct.

Q. And you have had courses and training in report writing, right?

A. Yes, I have.

Q. Because you understand it's important to get the information as accurate as possible, right?

A. That is correct.

Q. And as complete as possible, correct?

A. Yes, sir.

Q. And, obviously, as truthful as possible, right?

A. Most definitely.

Q. Now, in that report, Defendant's Exhibit #2, you would agree that there is nothing in that report about an inventory search; is that right?

A. Using the word specifically "inventory search," no, sir.

Q. Correct. And there is nothing in that report about the vehicle being impounded or any vehicle being impounded, correct?

A. That's correct.

Q. And when you took this information down, you recognized that – the Fourth Amendment and that there might be challenges to whether an arrest or a search is legal, right?

A. Yes, sir. Always.

Q. In fact – yes. In fact, you recognize that in every case, [62] right?

A. Yes, sir.

Q. So you try to get the most information you can from the witness that you're talking to, correct?

A. That is correct.

Q. And if it's relevant and important information, you write it down, don't you?

A. I try to always do that; but, of course, sometimes, being human, we miss something.

Q. Well, you would agree there's nothing in the report about an inventory search, right?

A. That is correct.

Q. And you would agree, wouldn't you, that if Sergeant Miller had told you anything about an inventory search, you would have put it in that report, right?

A. No, sir. He did tell me about an inventory search, and that is my error. I did not include that in the report.

Q. You never – he did tell you about an inventory search, but –

A. Yes.

Q. You have seen his incident/offense report as well, correct?

A. Yes, I have.

Q. And you saw that there was nothing about an inventory search in that document, too, didn't you?

A. Yes, sir.

[63] Q. Okay. When did Sergeant Miller tell you about an inventory search?

A. When I spoke with him and he told me that Ms. Stella Owens was taken into custody and they did the search of the vehicle incident to the arrest of Ms. Owens and him also not – also being arrested. He did tell me at that time that they did an inventory search of the vehicle.

Q. Okay. But he told you that Ms. Owens – the search was conducted incident to the arrest of Ms. Owens; is that correct?

A. Yes.

Q. Okay. And you also know that that was not in his report either, correct?

A. That is correct.

Q. Okay. And you would agree, then, that – well, let me ask you. When you – when you put this report together, Defendant's Exhibit #2, you had already seen the I and 0 report, Defendant's Exhibit #1, correct?

A. That's correct.

Q. And you knew that it was not in the I and 0 report, that there was nothing about search incident to arrest, protective sweep, or inventory search, correct?

A. Yes, sir.

Q. Okay. Would you agree, then, that it would have been even more important to put that in this report because it was not in the other report?

[64] A. That was my error. I was not concentrating on that portion of the report at that time. He did indeed tell me, and neglected to put it down.

Q. Okay. Did you take notes on that?

A. On what?

Q. On inventory search?

A. Did I take notes on how to do inventory search?

MR. VAN HEEST: I'm sorry. Let me strike that question. It was a poor question.

Q. When you met with Sergeant Miller, did you take notes?

A. Yes, I did.

Q. Okay. Were those handwritten notes?

A. Yes, they were.

Q. Okay. Do you remember whether you had anything about inventory search in your handwritten notes?

A. No, sir. I don't recall.

Q. Do you still have those handwritten notes?

A. No, I do not.

Q. And then is the report of investigation the product of your dictating from your notes?

A. Some of it is and also from my memory.

Q. Okay. Well, do you actually prepare it or does somebody else prepare the – type up the report?

A. I type it myself.

Q. Okay. So you're looking at your notes, then, and from your [65] memory when you type up that report, right?

A. Yes.

Q. So you want to make sure you include everything that's in your notes, correct, that's relevant?

A. If it's not in my notes, then I also depend on what I recall.

Q. So I mean you want to make sure that you're overinclusive rather than underinclusive, correct?

A. I try to include the information that the person told me.

Q. Now, this report, this Defendant's Exhibit #2, was prepared by you on May 8th of 2007?

A. That is correct.

Q. And this arrest of Mr. Davis was on April 27th of 2007?

A. That is correct.

Q. So this would – this report would have been shortly after, within two weeks after the arrest of Mr. Davis; is that right?

A. That is correct.

Q. And it would have been after you had discussed the case, obviously, with Sergeant Miller, correct?

A. Yes, sir.

Q. Since May 8th of 2007, you've had the opportunity to write supplemental reports, correct?

A. I'm not understanding your question, sir.

Q. Well, as you learn or remember new information, you can certainly include it in a report, correct?

[66] A. Yes.

Q. You can prepare a new report, correct?

A. Yes, I can.

Q. You can amend an old report, correct?

A. Yes, I can.

Q. Okay.

A. I will amend this one.

Q. And that was not done in this case, correct?

A. As of this date, no.

Q. Okay. So you're saying you're intending to amend it at some later time.

A. I'm planning on later today to amend it and add the inventory search as well as try to get a copy of the impound sheet.

Q. But again, you did say that this was based upon – that Sergeant Miller had told you that the car was searched incident to arrest and then an inventory was being prepared for impound and the car would be impounded, correct?

A. Could you repeat the last part of your question?

Q. Well, let me – let me break it down. You did say that the car was searched incident to the arrest of Ms. Owens, correct?

A. Correct.

Q. And then after that, it was – there was the other reason for the inventory; is that correct?

A. After that?

[67] Q. Well, let's –

A. After the incident?

MR. VAN HEEST: Strike that question.

A. Okay.

Q. Did Sergeant Miller tell you that Butler County Sheriff's Deputy Josh Williams was present?

A. Yes, he did.

Q. Okay. Did he also tell you that he had queried NCIC through his dispatcher for – checking for the name Ernest Harris and any warrant information?

A. Yes, sir.

Q. Okay. And did you understand that to mean that he had contacted the dispatcher while he was on the scene?

A. Yes, sir.

MR. VAN HEEST: Okay. Thank you. I don't have any further questions.

THE COURT: Any cross or – yes. Any cross?

MR. SHEPHERD: No, Your Honor.

THE COURT: You may step down.

Any additional witnesses, Mr. Van Heest?

MR. VAN HEEST: No, Your Honor.

THE COURT: Any rebuttal witnesses?

MR. SHEPHERD: No, Your Honor.

THE COURT: Well, gentlemen, as we said – or you said during the outset of this case, if the facts

are as they were in [68] the motion, that the motion would be due to be overruled. So I'll take this motion under advisement, and I will give you a ruling, a written ruling, shortly.

Is there anything further from the United States?

MR. SHEPHERD: Not from the United States, Your Honor.

THE COURT: Anything further from the defendant?

MR. VAN HEEST: Your Honor, we're still going to be on schedule for trial May 5th, aren't we?

THE COURT: Oh, yes. You should get a ruling within the next day or two, but I just need time to write up the R and R for the district judge.

MR. VAN HEEST: I understand. Okay. Thank you.

MR. SHEPHERD: Yes, Your Honor.

THE COURT: All right. Court is adjourned.

(Proceedings concluded at 11:16 a.m.)

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[Court Reporter's Certificate Omitted In Printing]

United States District Court,
M.D. Alabama,
Northern Division.

UNITED STATES of America

v.

Willie Gene DAVIS.

No. 2:07-cr-0248-WKW.
April 28, 2008.

Tommie Brown Hardwick, U.S. Attorney's Office, Montgomery, AL, for United States of America.

ORDER

W. KEITH WATKINS, District Judge.

Before the court is the Objection (Doc. # 56) to the Report and Recommendation (Doc. # 50) of the Magistrate Judge as to the defendant's Motion to Suppress (Doc. # 42). In his motion to suppress, the defendant admits the evidence obtained from the search incident to the arrest of the driver, Stella Owens, was properly obtained under binding Eleventh Circuit case law. (Doc. # 42, ¶ 9 .) Because the disposition of a case[1] recently granted a writ of certiorari by the United States Supreme Court could have possible ramifications to this case, the defendant "objects to perfect the issue for appeal." (Doc. # 56, at 3.)

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[1] *See Arizona v. Gant*, 162 P.3d 640 (Ariz.2007), *cert. granted*, 76 U.S.L.W. 34511 (U.S. Feb. 25, 2008) (No. 07-542).

Based on the defendant's concession of case law binding upon this court and the undisputed testimony, as pointed out in the Recommendation, that the search occurred not only after the arrest of the driver, but also after the arrest of the defendant for providing false information to a law enforcement officer, the defendant's objection on this issue is due to be overruled. *See United States v. Gonzales*, 71 F.3d 819, 825 (11th Cir.1996) ("When an occupant of an automobile is the subject of a lawful arrest, the Fourth Amendment permits the arresting officers to contemporaneously conduct a warrantless search not only of the occupant himself, but also of the passenger compartment of the automobile, as well as any closed (or open) containers found in this area of the automobile." (citation omitted)).

The defendant's second objection is to the Recommendation's alternative holding that the evidence was properly obtained under the inventory search exception. The court finds the gun was discovered during a search incident to arrest and not during an inventory search. The arresting officer testified that he was concerned with his safety and that the defendant had acted in a suspicious manner. (Mot. Hr'g Tr. 15:16-22; *Id.* 36:23-37:5.) He also testified that the first thing he searched was the jacket in the front seat. (*Id.* 36:11-16.) His impoundment inventory report lists beer as the only personal property found in the vehicle. (Doc. # 56-2, at 2.) There is no mention of the gun or the jacket. (*Id.*) This further supports the conclusion that the gun and jacket had been

confiscated after a search incident to arrest which took place before the inventory search began.

However, this does not change the conclusion because, as the Magistrate Judge noted (Doc. # 50, at 6), the officers would have inevitably discovered the jacket and its gun during the inventory search had they not already been confiscated following the search incident to arrest. *United States v. Khoury*, 901 F.2d 948, 959-60 (11th Cir.1990). The record indicates that the circumstances warranted impoundment of the vehicle as both the driver and passenger were arrested and under the influence of alcohol (Mot. Hr'g Tr. 13:21-14:8), that the police did undertake an inventory search and produced an inventory record (Doc. # 56-2, at 2), and that it was conducted pursuant to standard operating procedures (Mot. Hr'g Tr. 13:21-14:1). It is undisputed that the jacket was lying in plain view on the passenger seat. Even if the search of the jacket as incident to an arrest had been unlawful, the court finds that location of the jacket was so obvious that it, and the gun it contained, would have inevitably been discovered during the inventory search. Therefore, the defendant's second objection is also due to be overruled. After an independent and *de novo* review of the entire record and upon consideration of the defendant's Objection and the Recommendation of the Magistrate Judge, it is ORDERED that:

1. The Objection (Doc. # 56) is OVERRULED;

2. The Recommendation (Doc. # 50) is ADOPTED in part as set forth above; and

3. The Motion to Suppress (Doc. # 42) is DENIED. DONE this 28th day of April, 2008.

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

TERRY F. MOORER, United States Magistrate Judge.

On October 22, 2007, the Grand Jury for the Middle District of Alabama returned a one count indictment against defendant, Willie Gene Davis ("Davis"). The indictment alleges Davis is a felon who thereafter possessed an Iver Johnson revolver, in violation of 18 U.S.C. § 922(g)(1). Davis argues the discovery of the revolver violated his Fourth Amendment right to be free from unreasonable searches and seizures. *See* Doc. # 42, *Motion to Suppress Evidence Found in Vehicle*. Davis acknowledges his arguments would not prevail under Eleventh Circuit precedent, but nonetheless seeks to preserve the issue for possible appellate review. For the reasons below the Magistrate Judge recommends that the District Court deny the motion to suppress.

I. FACTUAL BACKGROUND

On April 27, 2007, Corporal (now Sergeant) Curtis Miller ("Miller") of the Greenville Police Department joined a traffic stop initiated by Officer Kenneth Hadley ("Hadley"). The uncontested grounds for the stop was violation of the city's noise ordinance.

When Sergeant Miller arrived Officer Hadley was standing at the window of the driver, Stella Owens ("Owens"). Owens was about to take a field sobriety test when Miller went to the passenger door and started a conversation with the passenger. Miller asked the passenger for his name, and noted some hesitation and thought by the passenger who gave the name "Ernest Harris" Miller testified he could smell alcohol on the passenger's breath, noted slurred speech, and saw him "fidgeting" with his jacket pockets. The fidgeting consisted of "Harris" moving his hands in and out of pockets, and doing so after Miller told "Harris" to keep his hands out of his pockets.

Meanwhile, having failed the sobriety test, Owens was placed under arrest for driving under the influence, and taken to Hadley's car. Harris began to remove his jacket when Miller asked Harris to get out of the car. Miller told "Harris" to leave the jacket on. In response, "Harris" zippered shut a pocket of the jacket, removed the jacket, and left it in his seat. Miller conducted a safety pat-down search of "Harris." The traffic stop was in a residential area and a crowd of citizens were gathered nearby. The hesitation shown by "Harris" to provide a name prompted Miller to ask the group whether the passenger's name was in fact Ernest Harris. Miller was told by an onlooker the passenger is Willie Gene Davis ("Davis"). Davis was then arrested for giving false information

to a law enforcement officer, handcuffed, and placed in Miller's vehicle.[1]

Miller testified any arrest of a driver results in the impoundment of the vehicle when there is no family member or passenger to take possession of and operate the vehicle. In preparation for impoundment of the car, Miller began an inventory search pursuant to standard operating procedure for Greenville police. In the jacket Davis left in the front passenger seat, Miller found a revolver in the zippered pocket. Miller testified that officer safety was always of paramount concern and the search of the vehicle was consistent with that goal. Under cross examination, Miller acknowledged his incident report did not make explicit reference to an "inventory search." He also acknowledged beginning the search with the jacket in the front passenger seat, as he had been curious about Davis' behavior concerning the garment.

II. DISCUSSION

The Supreme Court has held that searches and seizures conducted without a search warrant violate

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[1] Undisputed testimony during the suppression hearing showed Owens' vehicle was searched after Davis was arrested for providing false information to Miller. This is in contrast to the facts presented in Davis' motion and the United States' response, which recite that Miller searched the vehicle after Owens' arrest. *See* Doc. # 42, at ¶¶ 3-4; Doc. # 46, at 1-2. Davis' motion mistakenly alleges Miller conducted the "search incident to [the] arrest" of Owens.

the Fourth Amendment unless they fall within a limited set of well-defined exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). Davis argues Miller's search of Owens' vehicle did not meet any such exception but was instead an invalid warrantless search for evidence of an unspecified and unrelated offense. Consequently, Davis reasons the illegality of the search provide grounds for the suppression of the revolver discovered in the jacket. The United States defends the evidence as a lawful search incident to Owens' arrest. The facts and applicable law support the admission of the evidence.

Both parties cite *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) as the analytical starting point in this case. In *Chimel*, the Court made clear that

> [W]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated.

Chimel, 395 U.S. at 762-63, 89 S.Ct. at 2040. The operational issues which arose in searching vehicles incident to arrest led to new guidelines on constitutionally permissible searches for officer safety when automobile passengers were arrested. The Supreme Court expanded legitimate safety searches to passenger compartments of the recently occupied vehicle

and any containers – open or closed – located therein. *New York v. Belton*, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). The Eleventh Circuit has long repeated the rule from *Belton*, firmly establishing arresting officers' ability to conduct a contemporaneous warrantless search of a passenger compartment and containers. *United States v. Gonzalez*, 71 F.3d 819, 825 (11th Cir.1996).

In this case, the search was conducted after the valid arrests of both occupants. The revolver was located in the passenger compartment, inside a zippered jacket removed by Davis in full view of Miller. The search of this compartment is valid under the *Chimel-Belton* rationales for officer safety, and was appropriately limited to the passenger compartment and containers located therein. *Belton*, 453 U.S. 454, 101 S.Ct. 2860; *Chimel*, 395 U.S. 752, 89 S.Ct. 2034. Both parties agree that current law squarely covers these facts and requires this Court to recommend denial of the pending motion to suppress. Davis submits the facts are more akin to those in *Arizona v. Gant*, 216 Ariz. 1, 162 P.3d 630 (2007), *cert. granted* 128 S.Ct. 1443, 2008 WL 482034 (Feb. 25, 2008) and seeks to preserve the issue of the validity of the search should the Supreme Court's decision in that case affect the legality of the search in this case.[7]

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[7] In *Gant*, the Supreme Court will review the need to conduct vehicle searches when "police had no reason to believe that anyone at the scene could have gained access to (the

(Continued on following page)

Davis' motion to suppress is defective under another exception to the Fourth Amendment warrant requirement — the inventory search exception. *See South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Inventory searches are appropriate where police have the authority to impound a vehicle and the search is consistent with established policy. *United States v. Williams*, 936 F.2d 1243, 1248 (11th Cir.1991). The former Fifth Circuit endorsed three separate justifications for the exception as follows: (1) protection of the owner's property, (2) protection of the police from false claims of lost possessions, and (3) protection of the police from potential danger. *United States v. Staller*, 616 F.2d 1284, 1290 (5th Cir.1981) (citing *Opperman*, 428 U.S. at 372, 96 S.Ct. at 3098).[3] Miller categorized his actions involving the vehicle as an inventory search conducted pursuant to the Greenville Police Department's Standard Operating Procedure. The search was undertaken in preparation to impound the car because Owens failed her sobriety test and her passenger, Davis, was also under arrest for giving a fake name to law enforcement. Even if Davis had not given a false name to Miller, the car would have been sent to impound. Miller testified that Davis was not sober enough to safely drive the car. Under either

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arrestee's] vehicle or that the officers' safety was at risk." *Gant* 216 Ariz. at 4, 162 P.3d at 643.

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the Eleventh Circuit adopted as binding all decisions rendered by the former the Fifth Circuit prior to the close of business on September 30, 1981.

scenario, Miller's testimony about the arrest shows impoundment and inventory were appropriate under Greenville Police policy. Where a "vehicle has been lawfully impounded, the law enforcement officer may conduct an inventory search, including a search of closed containers, provided the search is conducted pursuant to standardized criteria." *Sammons v. Taylor*, 967 F.2d 1533, 1543 (11th Cir.1992). The court finds an inventory search was appropriate due to the arrests of both passengers in the car and the need to impound the vehicle. The officers inevitably would have discovered the evidence in the routine inventory search they were required to perform. *See United States v. Rhind*, 289 F.3d 690, 694 (11th Cir.2002). Under this analysis, the motion to suppress is due to be denied, and the revolver should be admissible against Davis at trial.

In conclusion, Miller's testimony that officer safety is always a consideration in traffic stops supported his search of Owens' car. Indeed, the rationale for searches incident to arrest and for inventory purposes both cite officer safety as grounds for their necessity. *See Chimel*, 395 U.S. 752, 89 S.Ct. 2034; *Staller*, 616 F.2d 1284. Here, the need to conduct a safety-related search of the car incident to the arrest of its recent occupants, and in preparation for impoundment were established by Miller's uncontroverted testimony.

III. CONCLUSION

For the foregoing reasons, it is the **RECOMMENDATION** of the Magistrate Judge that the

Motion to Suppress Evidence Found In Vehicle (Doc. # 42) filed by the defendant be **DENIED**.

It is further ORDERED that the parties shall file any objections to the said Recommendation by April 23, 2007 [sic]. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and advisements in the Magistrate Judge's Recommendation shall bar the party from a de novo determination by the District Court of issues covered in the Recommendation and shall bar the party from attacking on appeal factual findings in the Recommendation accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981, *en banc*) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

Done this 10th day of April, 2008.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16654

D. C. Docket No. 07-00248-CR-W-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE GENE DAVIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(March 11, 2010)

Before TJOFLAT, BARKETT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

Police arrested Willie Gene Davis after a traffic stop and searched the car in which he was riding as permitted by our decision in *United States v. Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996). On evidence obtained from that search, Davis was convicted for the unlawful possession of a firearm. During the

pendency of his appeal to this court, the Supreme Court overturned *Gonzalez* in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). We now decide whether the Fourth Amendment's exclusionary rule requires the suppression of evidence obtained from the search.

I

During a routine traffic stop in 2007, Sergeant Curtis Miller asked Willie Davis, the vehicle's only passenger, for his name. After a pause, Davis identified himself as "Ernest Harris." Miller could smell alcohol on Davis's breath, and he noticed Davis fidgeting with his jacket pockets. When the driver of the vehicle failed her field sobriety tests, Miller asked Davis to step out of the car.

As Davis exited the vehicle, he started to take off his jacket. Miller told him to leave it on, but Davis removed the jacket anyway and left it behind on the seat. Miller checked Davis for weapons and took him to the rear of the vehicle, where he asked a crowd of bystanders whether Davis's name was really Ernest Harris. The bystanders gave Davis's true name, which Miller verified with the police dispatcher, using Davis's birth date.

Miller arrested Davis for giving a false name and placed him, handcuffed, in the back of his patrol car. The driver of the vehicle was also arrested, handcuffed, and placed in a separate patrol car. Once the vehicle's occupants had been secured, Miller

searched it and found a revolver in one of Davis's jacket pockets.

After his indictment for possessing a firearm in violation of 18 U.S.C. § 922(g)(1), Davis filed a motion to suppress the gun. He conceded that our precedent required the court to deny his motion, but he moved to preserve the issue for appeal in light of the Supreme Court's grant of certiorari in *Arizona v. Gant*, 128 S. Ct. 1443 (2008). The district court denied his motion on the ground that Sergeant Miller had found the gun during a valid search incident to arrest.[1] Following a jury trial, Davis was convicted and sentenced to 220 months in prison.

II

In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Supreme Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." In so holding, the Court purported to apply the limiting rationale of its decision in *Chimel v. California*, 395 U.S. 752 (1969), which had "established that a search incident to an arrest may

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[1] The district court also concluded that police would inevitably have discovered the gun during an inventory search. Given our holding with respect to the exclusionary rule's good-faith exception, we find it unnecessary to address the inventory-search issue.

not stray beyond the area within the immediate control of the arrestee." *Belton*, 453 U.S. at 460. In its attempt to craft a "workable rule," however, the Court assumed "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary [item].'" *Id.* (alteration in original) (quoting *Chimel*, 395 U.S. at 763).

We, like most other courts, had read *Belton* to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment. *See, e.g., Gonzalez*, 71 F.3d at 825. As the Supreme Court later explained, its opinion in *Belton* was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718.

In *Arizona v. Gant*, the Court rejected that prevailing reading of *Belton*: "We now know that articles inside the passenger compartment are rarely within the area into which an arrestee might reach, and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches." 129 S. Ct. at 1723 (quotation marks and citation omitted). The Court replaced our interpretation of *Belton* with the following rule: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger

compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.*

Davis now relies on *Gant* to argue that the search after his arrest violated the Fourth Amendment and, therefore, that the gun recovered from his jacket should have been suppressed. The government responds that we should not retroactively apply the exclusionary rule to searches conducted in good-faith reliance on our precedent.

The retroactivity of a constitutional decision and the scope of the good-faith exception to the exclusionary rule are questions of law that we review *de novo*. *Glock v. Singletary,* 65 F.3d 878, 882 (11th Cir. 1995); *United States v. Martin,* 297 F.3d 1308, 1312 (11th Cir. 2002).

III

Although the Supreme Court's retroactivity doctrine has a complicated history, *see United States v. Johnson,* 457 U.S. 537, 542-48 (1982), it is now settled that "a decision of [the Supreme] Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered," *id.* at 562, "with no exception for cases in which the new rule constitutes a 'clear break' with the past," *Griffith v.*

Kentucky, 479 U.S. 314, 328 (1987).[2] *Accord Glazner v. Glazner*, 347 F.3d 1212, 1217 (11th Cir. 2003) ("[F]or newly announced rules governing criminal prosecutions, the Supreme Court has completely rejected both pure prospectivity, which occurs where a court gives a newly announced rule no retroactive effect, and modified prospectivity, which occurs where a court applies a newly announced rule retroactively on a case by case basis."). Because Davis's case was pending on direct appeal when *Gant* was decided, the rule announced in that decision applies to his case.

There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*. First, both he and the car's driver had been handcuffed and secured in separate police cruisers before Sergeant Miller performed the search. Second, Davis was arrested for "an offense for which police could not expect to find evidence in the passenger compartment," *Gant*, 129 S. Ct. at 1719, because Miller had already verified Davis's identity when he arrested him for giving a false name. *Gant* makes clear that neither evidentiary nor officer-safety concerns justify a vehicle search under these circumstances.

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[2] "Final" in this context refers to any "case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

Our conclusion that the search violated Davis's constitutional rights does not, however, dictate the outcome of this case. "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983)). Consequently, we must still decide whether the fruits of the illegal search should be suppressed.

We are not the first court of appeals to consider this question, but the other circuits have split on the issue. In the aftermath of *Gant*, the Ninth and Tenth Circuits have reached opposite conclusions as to the exclusionary rule's application in cases like this one. *Compare United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009) (applying the exclusionary rule to a pre-*Gant* search), *with United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) (relying on the rule's good-faith exception and refusing to require the suppression of evidence), *cert. denied*, No. 09-402 (Mar. 1, 2010). Similarly, before *Gant*, the Fifth Circuit refused to apply the exclusionary rule when police had relied in good faith on prior circuit precedent, *United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (*en banc*), but the Seventh Circuit expressed skepticism about applying the rule's good-faith exception when police had relied solely on caselaw in conducting a search,

United States v. 15324 County Highway E., 332 F.3d 1070, 1076 (7th Cir. 2003).[3] We now enter the fray and hold that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned.

A. *Retroactivity and the Exclusionary Rule*

In *United States v. Gonzalez*, 578 F.3d 1130, the Ninth Circuit reversed the denial of a motion to suppress evidence obtained in violation of *Gant*, even though the search at issue had occurred before *Gant* was decided. The basis for the court's decision was that retroactivity doctrine required not only the application of *Gant*'s new substantive rule, but also the application of the same remedy.[4] Because the

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[3] *See also United States v. Brunette*, 256 F.3d 14, 19-20 (1st Cir. 2001) (applying the good-faith exception to approve police reliance on a defective warrant that was issued when intercircuit caselaw governing the sufficiency of the warrant application was "unclear").

[4] Justice Alito's dissent in *Gant* appears to make a similar assumption. *See* 129 S. Ct. at 1726 (Alito, J., dissenting) ("The Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law. . . ."). But this assumption conflicts with the Court's statement that "the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance" on a broad reading of *Belton*. *Id.* at 1722 n.11 (Stevens, J.) (*obiter dictum*). Because the Court has explained that qualified-immunity doctrine employs " 'the same standard of objective reasonableness' " that defines the contours of the good-faith exception to the exclusionary rule, *Groh v. Ramirez*, 540 U.S.

(Continued on following page)

defendant in *Gant* had benefited from the exclusionary rule, the court explained, "'basic norms of constitutional adjudication'" required the suppression of evidence in all non-final cases involving similarly situated defendants. *Id.* at 1132 (quoting *Griffith*, 479 U.S. at 322-23).

We do not find this reasoning persuasive. The Ninth Circuit's decision turned, in large part, on its assumption that the Supreme Court's affirmance in *Gant* endorsed the manner in which the state court had applied the exclusionary rule below. *See Gonzalez*, 578 F.3d at 1132-33. But the Court's order granting Arizona's petition for a writ of certiorari in *Gant* explicitly limited the scope of review to the constitutionality of the search. 128 S. Ct. 1443. The Court's holdings are confined to the questions on which it grants certiorari, Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992), and in *Gant* neither the order granting certiorari nor the Court's subsequent opinion discusses the exclusionary rule at all.[5] In other words, the Court did not express approval of the exclusionary rule's application below merely by affirming the state court's

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551, 565 n.8 (2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)), the majority's statement fully supports our extension of the good-faith exception to cases involving reliance on well-settled precedent.

[5] In addition, the briefs and oral-argument transcript in *Gant* reveal that the State never argued for the application of the good-faith exception.

judgment.[6] Before the Supreme Court, *Gant* concerned the meaning of *Belton*, not the scope of the exclusionary rule.

We also disagree with the Ninth Circuit's contention that by declining to suppress evidence in cases like this we would fail to "fully appl[y]" *Gant*, thereby "violat[ing] 'the integrity of judicial review' by turning the court into . . . a legislative body announcing new rules but not applying them." *Gonzalez*, 578 F.3d at 1132 (quoting *Griffith*, 479 U.S. at 314). Our conclusion that Sergeant Miller's search violated Davis's constitutional rights *does* fully apply *Gant* to the facts of this case. *See United States v. Peoples*, 2009 WL 3586564, at *4 (W.D. Mich. Oct. 29, 2009). We consider constitutional violations and remedies separately in the Fourth Amendment context, *Leon*, 468 U.S. at 906, and the Supreme Court has refused to tie the retroactivity of new Fourth Amendment rules to the suppression of evidence, *see id.* at 912 n.9. As the Tenth Circuit observed in *McCane*, "[t]he issue before us . . . is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case." 573 F.3d at 1045 n.5.

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[6] The language of affirmance in *Gant* reads only: "The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed." 129 S. Ct. at 1724.

B. *Good Faith and the Exclusionary Rule*

"[T]he exclusionary rule is not an individual right"; it "applies only where it 'result[s] in appreciable deterrence,'" and "the benefits of deterrence must outweigh the costs." *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (quoting *Leon*, 468 U.S. at 909) (alteration in original).[*] Whether to suppress evidence obtained from an unconstitutional search thus "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* at 698. Because the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," the Supreme Court has established an exception to the rule's application for cases in which the officers who conducted an illegal search "acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 919.

The Court has gradually expanded this good-faith exception to accommodate objectively reasonable police reliance on: subsequently invalidated search warrants, *Leon*, 468 U.S. 897; subsequently invalidated statutes, *Illinois v. Krull*, 480 U.S. 340 (1987); inaccurate court records, *Arizona v. Evans*, 514 U.S. 1 (1995); and negligently maintained police records, *Herring*, 129 S. Ct. 695. In each of its decisions

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[*] "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free – something that 'offends basic concepts of the criminal justice system.'" *Herring*, 129 S. Ct. at 701 (quoting *Leon*, 468 U.S. at 908).

expanding the exception, the Court has concluded that the unlawful police conduct at issue was neither "sufficiently deliberate that exclusion [could] meaningfully deter it" nor "sufficiently culpable that such deterrence [would be] worth the price paid by the justice system." *Herring*, 129 S. Ct. at 702.

In this case, Sergeant Miller did not deliberately violate Davis's constitutional rights. Nor can he be held responsible for the unlawfulness of the search he conducted. At the time of the search, we adhered to the broad reading of *Belton* that the Supreme Court later disavowed in *Gant*, and a search performed in accordance with our erroneous interpretation of Fourth Amendment law is not culpable police conduct. Law enforcement officers in this circuit are entitled to rely on our decisions, and "[p]enalizing the officer for the [court's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations," *Leon*, 468 U.S. at 921. As the Tenth Circuit explained, the general "purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities," and there would be little "significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement." *McCane*, 573 F.3d at 1044.

Because the exclusionary rule is justified solely by its potential to deter police misconduct, suppressing evidence obtained from an unlawful search is

inappropriate when the offending officer reasonably relied on well-settled precedent.[5] This conclusion is consistent with the Supreme Court's reasoning in *Leon*, in which it declined to require the suppression of evidence obtained in reliance on a facially sufficient warrant issued by a neutral magistrate judge:

> First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. Third, and most important, we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.

468 U.S. at 916 (footnote omitted). We see no meaningful distinction between a magistrate judge's error in applying Supreme Court precedent to a probable-cause determination and our error in applying that same precedent to the question of a warrantless

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[5] We recognize that applying the good-faith exception under these circumstances may weaken criminal defendants' incentive to urge "new" rules on the courts, but the exclusionary rule is designed to deter misconduct, not to foster the development of Fourth Amendment law. *Cf. Herring*, 129 S. Ct. at 700 n.2 (noting that the Court has rejected a conception of the rule that "would exclude evidence even where deterrence does not justify doing so").

search's constitutionality. The exclusionary rule must be "restricted to those situations in which its remedial purpose is effectively advanced," *Krull*, 480 U.S. at 347, and suppressing evidence obtained in reliance on well-settled precedent would be no more effective in deterring police misconduct than would suppressing evidence obtained pursuant to a judge's probable-cause determination.

C. *Mistakes of Law and the Good-Faith Exception*

With this decision, we join the Fifth and Tenth Circuits in refusing to apply the exclusionary rule when the police have reasonably relied on clear and well-settled precedent. *See McCane*, 573 F.3d at 1045 ("[T]his court declines to apply the exclusionary rule when law enforcement officers act in objectively reasonable reliance upon the settled case law of a United States Court of Appeals."); *Jackson*, 825 F.2d at 866 ("[T]he exclusionary rule should not be applied to searches which relied on Fifth Circuit law prior to the change of that law. . . ."). We stress, however, that our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation. We have not forgotten the importance of the "incentive to err on the side of constitutional behavior," and we do not mean to encourage police to adopt a "'let's-wait-until-it's-decided approach'" to "unsettled" questions of Fourth Amendment law. *Johnson*, 457 U.S. at 561 (quoting *Desist v. United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting)).

The clarity of the *Belton* rule we followed before *Gant* is thus critical to our decision today. Although the Court in *Gant* insisted that *Belton* could have been interpreted in either of two ways, it also acknowledged that *Belton* was premised on a "faulty assumption" to which the doctrine of *stare decisis* did not require adherence. *Gant*, 129 S. Ct. at 1719, 1723. Indeed, we, like most of the other courts of appeals, treated the broader, permissive reading of *Belton* as well-settled. It is precisely in situations like this, when the permissibility of a search was clear under precedent that has since been overturned, that applying the good-faith exception makes sense. When the police conduct a search in reliance on a bright-line judicial rule, the courts have already effectively determined the search's constitutionality, and applying the exclusionary rule on the basis of a judicial error cannot deter police misconduct. *Cf. Krull*, 480 U.S. at 360 n.17. ("[T]he question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence.").

Our decision here is therefore consistent with our holding in *United States v. Chanthasouxat*, 342 F.3d 1271, 1280 (11th Cir. 2003), that "the good faith exception to the exclusionary rule . . . should not be extended to excuse a vehicular search based on an *officer's* mistake of law" (emphasis added). The justifications for the good-faith exception do not extend to situations in which police officers have interpreted ambiguous precedent or relied on their

own extrapolations from existing caselaw. When the police rely on novel extensions of our precedent, they engage in the sort of legal analysis better reserved to judicial officers, whose "detached scrutiny . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (quotation marks and citation omitted), *quoted in Leon*, 468 U.S. at 913-14.[9] When law enforcement officers rely on precedent to resolve legal questions as to which "[r]easonable minds . . . may differ," *Leon*, 468 U.S. at 914, the exclusionary rule is well-tailored to hold them accountable for their mistakes.[10]

Although an officer's mistake of law cannot provide objectively reasonable grounds for a search, *Chanthasouxat*, 342 F.3d at 1279, the mistake of law here was not attributable to the police. On the contrary, the governing law in this circuit unambiguously allowed Sergeant Miller to search the car. Relying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute, *cf.*

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[9] Unlike police officers, "[j]udges and magistrates are not adjuncts to the law enforcement team." *Leon*, 468 U.S. at 917.

[10] Because reasonable minds often differ when considering merely persuasive precedents, our extension of the good-faith exception is necessarily limited to situations in which the published decisions of this court clearly dictated the constitutionality of a search.

Krull, 480 U.S. 340, or a facially sufficient warrant, *cf. Leon*, 468 U.S. 897 – not to personally misinterpreting the law.

In this case, Sergeant Miller performed a search that our contemporaneous interpretation of *Belton* clearly permitted. Had the Supreme Court not subsequently rejected that interpretation in *Gant*, we undoubtedly would have upheld the search as constitutional. Because the search was objectively reasonable under our then-binding precedent, suppressing the gun found in Davis's jacket would serve no deterrent purpose. In accordance with our holding that the good-faith exception allows the use of evidence obtained in reasonable reliance on well-settled precedent, we refuse to apply the exclusionary rule here. Davis's conviction is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-16654-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE GENE DAVIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Alabama

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(Filed Apr. 18, 2010)

BEFORE: TJOFLAT, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

Petitioner's letter, which is construed as a petition for rehearing, is **DENIED**.

ENTERED FOR THE COURT:

/s/ Phylliss Kravitch
UNITED STATES CIRCUIT JUDGE

PETITIONER'S BRIEF

2

No. 09-11328

Supreme Court, U.S.
FILED
DEC 16 2010
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In The

Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether the exclusionary rule applies to an unconstitutional search on direct review if precedents at the time of the search incorrectly deemed such searches constitutional.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is *United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010). It appears in the Joint Appendix beginning at J.A. 107. The Magistrate Judge's Report and Recommendation and the order of the District Court for the Middle District of Alabama are available together as *United States v. Davis*, 2008 WL 1927377 (M.D. Ala. 2008). The District Court order appears in the Joint Appendix beginning at J.A. 96. The Report and Recommendation appears in the Joint Appendix beginning at J.A. 99.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment on March 11, 2010. J.A. 107. The Eleventh Circuit denied rehearing on April 14, 2010. J.A. 124. The petition for certiorari was filed on June 8, 2010, and the Court granted the petition on November 1, 2010. *Davis v. United States*, 2010 WL 2398383 (2010).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves an automobile search similar to that ruled unconstitutional in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). On April 27, 2007, Corporal Curtis Miller of the Greenville Police Department joined a traffic stop initiated by Officer Kenneth Hadley in a residential area of Greenville, Alabama. While Officer Hadley spoke to the driver, Corporal Miller walked around to the passenger side and asked the occupant for his name. The passenger paused for a moment and then responded that his name was "Ernest Harris." J.A. 24. The passenger appeared nervous, and Miller suspected that he had provided a false name. After Officer Hadley arrested the driver of the car for drunk driving, Corporal Miller asked the passenger to step out of the car. J.A. 108.

The passenger exited the vehicle. As he did so, he removed his jacket and placed it on the passenger seat. A crowd of bystanders had gathered by this point, and Miller asked the crowd if anyone recognized the passenger. One of the bystanders knew the passenger and correctly identified him as Willie Gene Davis. J.A. 27. Miller arrested Davis for providing

false information to an officer, and he put Davis in the back of Miller's police car. Miller then searched the stopped car beginning with the jacket Davis had left on the passenger seat. Miller found a revolver inside one of the jacket's pockets. J.A. 30.

Davis was indicted for being a felon in possession of a firearm. J.A. 8. On April 1, 2008, Davis moved to suppress the firearm on Fourth Amendment grounds. J.A. 10. Davis acknowledged that Miller's search was constitutional according to Eleventh Circuit precedent. J.A. 15. The motion to suppress explained that the Supreme Court had recently granted certiorari in *Arizona v. Gant*, No. 07-542, and that *Gant* would reconsider when automobiles can be searched incident to arrest. Because *Gant* would decide the lawfulness of the search in Davis's case, Davis objected to the search and requested a suppression hearing to preserve the issue for review pending the outcome in *Gant*. J.A. 15.

The Magistrate Judge held a suppression hearing on the motion. At the outset, the Magistrate Judge acknowledged that the only purpose of the hearing was to create a record for review when the Supreme Court decided *Gant*. J.A. 18-19. Counsel for Davis agreed, noting that "if we were to lose the case and the case was on appeal at the time [*Gant* is handed down], there would need to be a record made" for Davis to benefit from any new rule announced in *Gant*. J.A. 20.

Miller then took the stand. Miller testified that he had searched the car for two reasons. First, he was conducting an inventory search that required him to safeguard the property inside the car before it was impounded. J.A. 29. Second, Davis's suspicious activity caused Miller to suspect there may be a "safety concern" in the car. *Id.* Two days after the hearing, the Magistrate Judge filed a Report recommending that the motion to suppress be denied because "[b]oth parties agree that current law squarely covers these facts and requires this Court to recommend denial of the pending motion to suppress." J.A. 103.

On April 29, 2008, the District Court denied the motion to suppress. J.A. 96. The District Court recognized that the motion had been brought only to preserve the issue pending the outcome of *Arizona v. Gant*. Because *Gant* was still pending, however, the District Court denied the motion based on then-current Eleventh Circuit law that allowed a routine search of the passenger compartment of the car after an arrest of the driver or a passenger. J.A. 97. (citing *United States v. Gonzales*, 71 F.3d 819, 825 (11th Cir. 1996)). The case proceeded to trial, and the revolver was admitted. The jury returned a verdict of guilty. On November 6, 2008, the District Court sentenced Davis to serve 220 months in prison. J.A. 5.

A few months later, on April 21, 2009, the Supreme Court finally handed down *Arizona v. Gant*, 129 S.Ct. 1710 (2009). *Gant* overturned the circuit court case law that had taken a broad interpretation of *New York v. Belton*, 453 U.S. 454 (1981). The

lower-court decisions had permitted the police to search the passenger compartment of a car as a routine matter after arresting a recent occupant. In the place of the *Belton* rule adopted by lower courts, including the Eleventh Circuit, *Gant* announced a new rule: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 129 S.Ct. at 1723.

On appeal before the Eleventh Circuit, Davis argued that *Gant* required his conviction to be overturned. The Court of Appeals agreed that *Gant* applied. Under *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), new rules of criminal procedure apply to all cases not yet final when the new rule was announced. "Because Davis's case was pending on direct appeal when *Gant* was decided, the rule announced in that decision applies to his case." J.A. 112. The Court of Appeals also agreed that applying *Gant* required holding that Davis's Fourth Amendment rights had been violated: "There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*." *Id.* The Court of Appeals nonetheless affirmed the conviction on the ground that whether the Fourth Amendment "applied" was distinct from whether it afforded Davis a remedy. J.A. 113.

According to the Court of Appeals, the remedy of the exclusionary rule was unavailable because "the

exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned." J.A. 114. The exclusionary rule was unavailable because the sole purpose of the exclusionary rule is to deter police misconduct. A police officer who "reasonably relied on well-settled precedent" was not at fault, however, and therefore could not be deterred by suppression of evidence:

> Miller did not deliberately violate Davis's constitutional rights. Nor can he be held responsible for the unlawfulness of the search he conducted. At the time of the search, we adhered to the broad reading of *Belton* that the Supreme Court later disavowed in *Gant*, and a search performed in accordance with our erroneous interpretation of Fourth Amendment law is not culpable police conduct. Law enforcement officers in this circuit are entitled to rely on our decisions, and penalizing the officer for the court's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

J.A. 118 (internal quotations and citations omitted).

The Court of Appeals analogized police reliance on circuit precedent to reliance on defective warrants in *United States v. Leon*, 468 U.S. 897 (1984), reliance on defective statutes in *Illinois v. Krull*, 480 U.S. 340 (1987), and reliance on police bookkeeping errors in *Herring v. United States*, 129 S.Ct. 695 (2009). Just as the exclusionary rule did not apply in those cases,

neither should it apply here. J.A. 119-20. The Court of Appeals recognized that its holding would mean that new Fourth Amendment rules would have only prospective effect, and that this "may weaken criminal defendants' incentive to urge 'new' rules on the courts." J.A. 119 n.8. But the court reasoned that this was irrelevant because "the exclusionary rule is designed to deter misconduct, not to foster the development of Fourth Amendment law." *Id.*

SUMMARY OF THE ARGUMENT

This is a case about the role of the Supreme Court in the development of Fourth Amendment law. The Supreme Court occasionally must correct a mistaken precedent and set Fourth Amendment law on its proper course. When this happens, the Court has always retained the power to enforce its new decision through the exclusionary rule. For example, in the famous case of *Katz v. United States*, 389 U.S. 347 (1967), the Court overturned *Olmstead v. United States*, 277 U.S. 438 (1928), and recognized that the Fourth Amendment prohibits wiretapping phone calls without a warrant. The Court did not merely announce its new decision in an advisory opinion. Instead, the Court reversed Katz's conviction. The exclusionary rule applied despite the Government's reliance on overturned law.

This case considers whether the Court should adhere to its traditional role or instead should embark

on a new experiment. Under the approach embraced by the Court of Appeals, new Fourth Amendment decisions could apply only prospectively. When correcting erroneous precedent, the Supreme Court would make its decision but not enforce it. The Court would issue an advisory opinion and then affirm the conviction because the officers acted in reliance on the precedent overturned.

The Court should decline to embark on this experiment for three reasons. First, the decision below upsets long-established practice and precedent. A simple rule governs the scope of the exclusionary rule for new decisions: The exclusionary rule applies in the decision announcing the new rule and in all other cases not yet final but does not apply on collateral review. The Court adopted this rule in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), a case that finally closed the jurisprudential Pandora's Box opened by *Linkletter v. Walker*, 381 U.S. 618 (1965). The decision below offers a return to the discredited *Linkletter* regime with a new label of "good faith" instead of the old label of "retroactivity." The Court should adhere to *Griffith* and hold that the exclusionary rule applies.

Second, the rule adopted by the Court of Appeals ignores the limits of the judicial power under Article III. If the exclusionary rule does not apply, the Supreme Court cannot review Fourth Amendment challenges brought by criminal defendants to settled precedents. The Government would always win such cases. If the Court agreed with the precedent it would rule for the Government on the merits, and if the

Court overturned the precedent it would rule for the Government under the good-faith exception. The absence of any genuine controversy would deny Article III standing to defense challenges and require courts to engage in prospective decisionmaking that the Constitution forbids.

Third, a new exception to the exclusionary rule for reliance on overturned decisions should be rejected because the exclusionary rule provides the only realistic way for the Court to correct mistakes. The exclusionary rule triggers defense challenges, and those challenges enable reconsideration of circuit and Supreme Court caselaw. Without the exclusionary rule, the direction of Fourth Amendment law would become a one-way street in favor of expanded government power. The exclusionary rule therefore deters constitutional violations by ensuring that the police have accurate rules to enforce. Good-faith cases including *United States v. Leon*, 468 U.S. 897 (1984), *Illinois v. Krull*, 480 U.S. 340 (1987), and *Herring v. United States*, 129 S.Ct. 695 (2009), are distinguishable because they deal with the enforcement of existing law rather than the law's proper development.

Finally, the costs of the exclusionary rule for reliance on overturned precedents are modest. The exclusionary rule is already full of holes: The fact that it is available does not mean it will be applied often. A defendant must successfully navigate a long trail of doctrines before courts actually grant relief. Those doctrines include inevitable discovery, independent source, attenuated basis, standing, plain error, and

harmless error. By sharply limiting the exclusionary remedy in practice, these doctrines have greatly reduced its cost. The exclusionary rule therefore pays its way and should be retained.

ARGUMENT

I. WHEN THE SUPREME COURT OVERTURNS FOURTH AMENDMENT PRECEDENT, THE EXCLUSIONARY RULE IS AVAILABLE FOR THE CASE ANNOUNCING THE NEW RULE AND ALL OTHER CRIMINAL CASES NOT YET FINAL.

The rule adopted by the Court of Appeals represents a dramatic departure from the established precedent of this Court. Over dozens of decisions in the last fifty years, the Court has established a clear and simple test for the scope of the exclusionary rule when new decisions reinterpret Fourth Amendment rights. According to those precedents, the exclusionary rule is available in the case announcing a new rule and all other cases on direct review, while the exclusionary rule is not available in collateral challenges such as habeas proceedings.

"[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring). As a result, the starting point in this case must be understanding how the rule adopted below departs from the Court's

precedents on the scope of the exclusionary rule for new Fourth Amendment decisions.

(A) The Exclusionary Rule Is Available In The Case Announcing The New Rule.

It is well-established that the exclusionary rule is available to enforce the new rule in the decision in which it is announced. *See Stovall v. Denno*, 388 U.S. 293, 301 (1965). This principle is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.* Applying the exclusionary rule in the case announcing a new rule of criminal procedure has two major functions. First, it ensures that the Court "resolve[s] issues solely in concrete cases or controversies." *Id.* Second, it provides the "incentive of counsel to advance contentions requiring a change in the law." *Id.*

A few examples demonstrate the point. In the famous case of *Katz v. United States*, 389 U.S. 347 (1967), federal agents investigating unlawful betting placed a monitoring device on a public phone booth without a warrant. Agents used the monitoring device to eavesdrop on the suspect's calls. The eavesdropping was lawful under two precedents, *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942). The *Katz* Court overruled *Olmstead* and *Goldman* and held that the monitoring required a warrant. *See Katz*, 389 U.S. at 353. The Court then rejected the government's argument that the fruits of surveillance should be

admitted because the officers "relied upon the decisions in *Olmstead* and *Goldman*." *Id.* at 356. Refusing to "retroactively validate [the agents'] conduct," *id.*, the Court overturned the conviction because no warrant had been obtained: "Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed." *Id.* at 359.

The Court followed the same approach in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). The officer in *Gant* had relied on Ninth Circuit precedent allowing officers to arrest a driver, handcuff him, secure him in a locked squad car, and then search the passenger compartment of the car incident to arrest. After holding that such searches were unconstitutional, the Court affirmed the judgment of the Arizona Supreme Court that had vacated Gant's conviction. *See id.* at 1724. The Court gave Gant the benefit of the rule announced in his case. *See id. See also State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007) (ruling that no exception to the exclusionary rule applied, and thus that "[t]he evidence obtained as a result of the unlawful search must therefore be suppressed.").

This rule has been followed consistently in other Fourth Amendment decisions that overturned clear circuit precedent. *See, e.g., Steagald v. United States*, 451 U.S. 204, 223, 207 n.1 (1981) (announcing new rules on when warrants are required to enter a home, and then reversing and remanding to give the petitioner the benefit of the new rule despite prior circuit precedent clearly permitting such searches); *Chimel*

v. California, 395 U.S. 752, 768 (1969) (announcing new rules on the "search incident to arrest" exception, and then reversing state court decision to give the petitioner the benefit of the new rule despite prior Supreme Court precedent permitting such searches).

(B) The Exclusionary Rule Is Available In All Cases On Direct Review At The Time Of The New Decision.

The Court has embraced the same rule for other cases on direct review at the time of the new decision. The exclusionary rule is available in all cases not yet final on the date the new rule is announced. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception"). This rule has generally been understood as a rule on the "retroactivity" of new decisions: New decisions are retroactive, and therefore the exclusionary rule applies, to cases on direct review when the new decision was announced. *See Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review.") (citing *Griffith*).

Powell v. Nevada, 511 U.S. 79 (1994), is a helpful example. Powell was arrested and detained for four days before he received a probable cause hearing to determine the lawfulness of his detention. Two years

later, this Court ruled that the Fourth Amendment requires a post-arrest probable cause hearing within 48 hours of arrest. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Because Powell's conviction was not yet final, Powell argued that his conviction should be overturned under *McLaughlin*. The Nevada Supreme Court disagreed, ruling that Powell should not be able to benefit from the new rule of *McLaughlin* because of the harmful consequences of applying its new rule to arrests made before the decision. *See Powell v. State*, 838 P.2d 921, 924 n.1 (1992). The Supreme Court vacated and remanded. *See Powell*, 511 U.S. at 85. Under the retroactivity rule of *Griffith*, Powell was entitled to "rely on *McLaughlin* for this simple reason: Powell's conviction was not final when *McLaughlin* was announced." *Powell*, 511 U.S. at 84. Although this did not necessarily mean that Powell would be set free, it did mean that Powell had the opportunity to argue that his conviction should be overturned. *See id.* at 84-85.

The application of the exclusionary rule to other cases still on direct review is also reflected in the Court's decisions to grant, vacate, and remand (GVR) nine pending cases in light of *Arizona v. Gant* in the weeks following that decision. All nine cases were brought by defendants challenging searches made in reliance on the *Belton* rule that *Gant* rejected. *See, e.g., Megginson v. United States*, 129 S.Ct. 1982 (2009); *Grooms v. United States*, 129 S.Ct. 1981 (2009); *Dunson v. United States*, 129 S.Ct. 2155 (2009); *Booker v. United States*, 129 S.Ct. 2155 (2009);

Meister v. Indiana, 129 S.Ct. 2155 (2009); *Owens v. Kentucky*, 129 S.Ct. 2155 (2009); *Quintana v. United States*, 129 S.Ct. 2156 (2009); *Casper v. United States*, 129 S.Ct. 2156 (2009); *Carter v. North Carolina*, 129 S.Ct. 2158 (2009). The GVRs enabled lower courts to enforce *Gant* on remand using the exclusionary rule. *See, e.g., United States v. Megginson*, 340 Fed.Appx. 856 (4th Cir. 2009) (applying *Gant* on remand and vacating the conviction due to *Gant* violation); *State v. Carter*, 682 S.E.2d 416 (N.C.App. 2009) (same).

The record in this case reflects the same expectation. In the District Court, Davis moved to suppress the gun because the Supreme Court had recently granted certiorari in *Gant*. J.A. 10-16. In the motion to suppress and at the hearing, Davis candidly acknowledged that then-existing circuit precedent deemed the search constitutional. J.A. 15 ("The defendant would not prevail under existing Eleventh Circuit precedent."); J.A. 19. The only purpose of the suppression hearing was to establish a record so that the forthcoming decision in *Gant* could be applied to Davis on direct review in the event of a conviction. J.A. 19.

Although the Fourth Amendment's exclusionary rule is available on direct review, a different rule applies after the conviction is final. The suppression remedy for Fourth Amendment violations is not available in habeas or other collateral review proceedings. *See Stone v. Powell*, 428 U.S. 465, 482 (1976). After a conviction is final, the marginal deterrent effect of the exclusionary rule is modest because the

exclusionary rule is available on direct review. *See id.* at 493. At the same time, the costs of the exclusionary rule for collateral review proceedings are quite substantial because it would potentially free inmates whose convictions have become final over many years. *Id.* at 494. Weighing those costs and benefits, the exclusionary rule is available on direct review but not in collateral review proceedings. *Id.* at 493-94. *Cf. Teague v. Lane*, 489 U.S. 288 (1989) (adopting very limited retroactivity on collateral review for criminal procedure rules outside the Fourth Amendment).

(C) The Exception To The Exclusionary Rule Created By The Court Of Appeals Reopens The Pandora's Box Of Retroactivity Law That The Court Closed In *Griffith v. Kentucky*.

The rule adopted by the Court of Appeals would be a dramatic break from this established practice. Under its decision, the exclusionary rule never applies when the police rely on "unequivocal" but incorrect circuit precedent. J.A. 120. The Court of Appeals believed that its approach was consistent with prior caselaw because it imagined two distinct inquiries. The first question was whether a new decision "applies" in an abstract sense, which the Court of Appeals saw as a question of retroactivity law. The second question was whether a remedy exists, which the Court of Appeals saw as a separate question of the scope of the exclusionary rule. J.A. 116.

The Court of Appeals was incorrect because retroactivity is about remedies, not rights. The retroactivity of criminal procedure rules determines the scope of the exclusionary rule when law changes:

> [T]he source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

Danforth v. Minnesota, 552 U.S. 264, 271 (2008). *See also id.* n.5 (noting that "retroactivity" is a misnomer, as the issue is the redressability of violations based on newly recognized rules). The Constitution *always* applies. Retroactivity defines remedies, not rights.

Because the exclusionary rule is the only means of overturning a conviction based on a Fourth Amendment violation, cases on the retroactivity of Fourth Amendment decisions define the scope of the exclusionary rule when the Court hands down new decisions. The law of "retroactivity" is simply a specific application of the usual balancing test for the scope of the exclusionary rule in the context of new caselaw. *See, e.g., United States v. Peltier*, 422 U.S. 531, 538 (1975) (noting the "interrelation" and "harmony" between retroactivity caselaw specifically and decisions

on the scope of the exclusionary rule generally); *Stone v. Powell*, 428 U.S. 465, 489 n.26 (1976) ("Cases addressing the question whether search-and-seizure holdings should be applied retroactively also focused on the deterrent purpose served by the exclusionary rule, consistently with the balancing analysis applied generally in the exclusionary rule context."); *United States v. Leon*, 468 U.S. 897, 912-14 (1984) (noting the similarity between retroactivity law and cases expressly on the scope of the exclusionary rule).

The rule adopted by the Court of Appeals is particularly ironic in light of the history of retroactivity law. As the Court detailed recently in *Danforth*, 552 U.S. at 271-75, there have been several distinct periods of retroactivity law for criminal procedure decisions. Before 1965, the exclusionary rule always applied retroactively to enforce new legal decisions. From 1965 to 1987, however, the exclusionary rule was often applied only prospectively. The exclusionary rule always applied in the case announcing the new interpretation. *Stovall*, 388 U.S. at 301. In other cases, however, the Court decided whether the exclusionary rule applied retroactively using a case-by-case balancing test that weighed the deterrent impact of the exclusionary rule against the cost of setting criminals free. *See Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965) (adopting balancing test for application of the exclusionary rule to enforce new decisions in habeas cases); *Stovall*, 388 U.S. at 301 (adopting *Linkletter* balancing test to other cases on direct review).

During this period from 1965 to 1987, the exclusionary rule applied to other cases not yet final only if it would serve "the deterrent purpose of the exclusionary rule" for each specific new decision in light of the fact that retroactive application would "overturn convictions based on fair reliance upon [overruled] decisions." *Desist v. United States*, 394 U.S. 244, 253 (1969). This case-by-case balancing approach created a "confused and confusing" patchwork of decisions with "strikingly divergent results." *Danforth*, 552 U.S. at 271, 273. Justice Harlan offered particularly devastating critiques of the balancing approach that "laid the groundwork for the eventual demise of the *Linkletter* standard." *Id.* at 274 (citing *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part)).

The Court rejected the *Linkletter* balancing approach in three steps. First, in 1982, the Court ruled that all Fourth Amendment cases were retroactive so long as the new decisions were not a "clear break" from prior precedent. *See United States v. Johnson*, 457 U.S. 537, 562 (1982). Next, in 1987, the Court rejected the balancing approach entirely and adopted a bright-line rule that the exclusionary rule is available to all cases on direct review whether or not the new decision is a clear break. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The opinion in *Griffith* focused on the need to treat like cases alike, rather than costs and benefits, but the Court later noted that *Griffith* implicitly rejected reasonable

reliance on precedent as a justification for prospective decisionmaking on direct review. *See American Trucking Associations v. Smith*, 496 U.S. 167, 198 (1990). Finally, in 1989, the Court rejected the *Linkletter* balancing test on collateral review. *See Teague v. Lane*, 489 U.S. 288 (1989).

With this background, it becomes clear that the decision of the Court of Appeals reopens the Pandora's Box of retroactivity law on direct review that this Court was thought to have slammed shut in *Griffith*. The rule adopted by the Court of Appeals is characterized as a decision on the good-faith exception to the exclusionary rule. J.A. 123. But the Court of Appeals' rule is simply a modified version of the discredited *Linkletter* retroactivity test. Just like *Linkletter*, it weighs reliance interests against deterrence interests to determine when the exclusionary rule applies. If anything, the rule adopted below goes beyond *Linkletter* in that it avoids suppression even in the case announcing the new rule.

The sense of déjà vu becomes particularly strong if you compare the rule adopted below with the rule rejected in *United States v. Johnson*, 457 U.S. 537 (1982). *Johnson* considered whether the exclusionary rule applied to other cases on direct review when the Supreme Court handed down a new Fourth Amendment rule in *Payton v. New York*, 445 U.S. 573 (1980). In its brief to this Court, the United States argued that *Linkletter* retroactivity doctrine should be read to create a good-faith exception to the exclusionary rule for reliance on then-existing law on direct review.

"[W]here law enforcement officers obtained . . . evidence in good faith compliance with then-prevailing constitutional norms," the United States argued, "neither the deterrent purpose of the rule nor the imperative of judicial integrity justified the suppression of highly probative evidence." Brief of the United States in *United States v. Johnson* at 9 (citing *United States v. Peltier*, 422 U.S. 531 (1975)). This exception to the exclusionary rule was appropriate, the United States asserted, because the police could not be deterred if they "did not know, and could not reasonably be charged with knowing, that their actions were proscribed by the Fourth Amendment." *Id.* at 10.

The *Johnson* Court rejected the Government's proposed good-faith exception on grounds that it would reduce retroactivity to "an absurdity" and essentially "eliminate *all* Fourth Amendment rulings from consideration for retroactive application." *Johnson*, 457 U.S. at 560 (emphasis in original). The Court instead used *Johnson* as a "first step" towards applying the exclusionary rule to all cases on direct review – a journey later completed in *Griffith*. *Id.* at 562. Johnson was therefore entitled to invoke the exclusionary rule to benefit from the new rule of *Payton*. *Id.*

The argument of the United States in this case recycles its failed argument in *Johnson*. Granted, the label has changed. In *Johnson*, the United States sought a good-faith exception to the exclusionary rule for new legal decisions under the cost/benefit balancing test required by retroactivity doctrine. In this

case, the United States seeks a good-faith exception to the exclusionary rule for new legal decisions under the cost/benefit balancing test required by exclusionary rule doctrine. Aside from the label, though, the territory is familiar. This case is a retroactivity case in disguise. And it is a thin disguise, the legal equivalent of Groucho Marx glasses with a funny nose.

II. IF THE EXCLUSIONARY RULE DOES NOT APPLY, ARTICLE III WILL PROHIBIT THE SUPREME COURT FROM REVIEWING CHALLENGES TO CIRCUIT COURT OR SUPREME COURT FOURTH AMENDMENT DECISIONS IN CRIMINAL CASES.

The established practice that the exclusionary rule applies to cases announcing new rules and to all other cases on direct review is not only deeply ingrained in existing caselaw. It is also required by Article III of the United States Constitution. The judicial power recognized by Article III does not permit the Supreme Court to review cases and resolve questions of law when its decision would not have any actual impact on the case before it or on any other case.

Creating an exception to the exclusionary rule for searches consistent with overturned precedents would render the Supreme Court unable to provide relief to criminal defendants who brought such challenges. As a result, Article III would leave the Court

unable to review challenges to circuit court or Supreme Court Fourth Amendment precedents in criminal cases. This result can be reached under either of two closely-related constitutional doctrines: first, the prohibition on prospective decisionmaking; and second, the requirement of Article III standing.

(A) The Decision Below Would Require Courts To Engage In Prospective Decisionmaking That The Constitution Forbids.

The decision below permits new Fourth Amendment decisions to be applied only prospectively. So long as erroneous circuit precedent clearly permitted the challenged search, new rules expanding constitutional protection would not apply either to the case announcing the rule or in other cases on direct review. J.A. 121-23. The Constitution forbids such a rule, however. "[P]rospective decisionmaking is quite incompatible with the judicial power," and "courts have no authority to engage in the practice." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring).

The judicial power is the power to interpret the law, "not the power to change it." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). This fundamental principle requires judges to "discern[ ] what the law *is*, rather than decree[ ] what it is today *changed to*, or what it will *tomorrow* be." *Id.* (emphasis in original).

A rule that the Court can announce a decision one day that has no effect on actual cases is not permitted by the judicial power recognized by Article III. Justice Harlan expressed the point memorably:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

Griffith, 479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part)).

The requirement of retroactive application therefore is "one of the understood checks upon judicial law-making" that is necessary to maintain "the assigned balance of responsibility and power among the three branches." *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment). "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322.

The decision below violates this fundamental principle. According to the Court of Appeals, police compliance with "well-settled" circuit precedent frees

the Supreme Court to craft a purely prospective new rule that does not apply either in the case in which it was announced or in other cases not yet final. J.A. 123. This portends a regime of rule-creation by advisory opinion. It would allow the Court to act like a legislature, pick a rule, and then enforce it only in future cases. The federal courts have no such power. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam) ("A federal court is without power . . . to give advisory opinions which cannot affect the rights of the litigants in the case before it.").

The Court deviated in part from this timeless principle for a "brief period" during the *Linkletter* regime from 1965 to 1987. *Harper*, 509 U.S. at 104 n.1 (Scalia, J., concurring). But that deviation has been recognized as both a jurisprudential error and a practical blunder. *See Danforth*, 552 U.S. at 271-75; *Griffith*, 479 U.S. at 320-28. The Court should not repeat the same mistake under the guise of "good faith."

(B) Under The Decision Below, The Supreme Court Could Not Review Challenges To Circuit Court Or Supreme Court Precedent Because The Good-Faith Exception Would Eliminate Article III Standing.

The rule adopted by the Court of Appeals would also eliminate review of challenges to circuit court and Supreme Court precedent because such challenges would lack Article III standing. Article III standing requires a likelihood "that a favorable

judicial decision will prevent or redress the injury." *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1149 (2009). Article III standing operates on a claim-by-claim basis: The party bringing the challenge "must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Further, a party seeking to appeal an adverse ruling must establish standing for the issue appealed. *See Diamond v. Charles*, 476 U.S. 54, 66-67 (1986); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997).

Under the decision below, a criminal defendant will be unable to establish Article III standing to challenge a circuit court or Supreme Court precedent. If the good-faith exception applies whenever a search is authorized under clear circuit precedent, the outcome of any legal challenge to that precedent will always be the same. The Government must always win. If the Court agrees with the Government on the Fourth Amendment issue, the Court will rule for the Government on the merits. If the Court instead agrees with the defendant on the Fourth Amendment issue, the Court will rule for the Government on the good-faith exception. The good-faith exception would deny the Court the power to redress the defendant's injury, eliminating Article III standing to adjudicate the merits of the case.

Because the defendant bringing the challenge would have no prospect of success, the appeal would be impermissibly "placed in the hands of concerned bystanders . . . who would seize it as a vehicle for the

vindication of value interests" rather than parties with a genuine "stake in the outcome." *Arizonans for Official English*, 520 U.S. at 64-65 (quoting *Diamond*, 476 U.S. at 62). The good-faith exception would operate much like an independent and adequate state ground in that it would block federal court review of federal constitutional questions. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) ("When this Court reviews a state court decision on direct review . . . , it is reviewing the *judgment;* if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Under the rule adopted below, the direction of Fourth Amendment law would become a one-way street in favor of expanded government power. The Government could challenge adverse precedents and immediately gain the benefit of the new decision. But defendants could not: The limits of Article III would block criminal defendants from raising such challenges.

III. THE GOOD-FAITH EXCEPTION DOES NOT APPLY BECAUSE THE EXCLUSIONARY RULE ENSURES THE PROPER DEVELOPMENT OF FOURTH AMENDMENT LAW NEEDED TO DETER CONSTITUTIONAL VIOLATIONS.

The Court of Appeals based its holding on the good-faith exception to the exclusionary rule. According to the Eleventh Circuit, a good-faith exception

applies when the police conduct a search "in reasonable reliance on well-settled precedent" that is subsequently overturned. J.A. 123. At first blush, this conclusion makes some intuitive sense. An officer who follows existing law likely has acted in good faith. Surely he cannot know that the law may change some day. Because he is not at fault, he cannot be deterred and should not be punished by the exclusionary rule. Such an argument may even seem initially plausible in a case, like this one, where the officer who conducted the search did not actually rely on the circuit precedent later overturned. J.A. 29. Although Corporal Miller did not subjectively rely on the Eleventh Circuit precedent overturned by *Gant*, his search did comply with that circuit precedent. It therefore seems plausible, at first blush, that Miller's compliance with precedent should justify a good-faith exception.

This line of thinking has intuitive appeal, but it is wrong. It reflects a basic misunderstanding of the good-faith exception. When understood properly, the good-faith exception cannot extend to searches that are consistent with subsequently overturned appellate court precedents. The good-faith exception requires an objective cost-benefit analysis into when the exclusionary rule is needed to enforce compliance with existing law. *See Herring v. United States*, 129 S.Ct. 695, 703 (2009); *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987). Contrary to its name, the good-faith exception does not concern subjective good faith. *See Herring*, 129 S.Ct. at 701, 703. Rather, cases on the good-faith exception recognize that the Fourth

Amendment imposes too many requirements for every constitutional violation to justify suppression. The good-faith exception thus distinguishes minor violations of the Fourth Amendment that do not require suppression from major violations of the Fourth Amendment that do. *See Hudson v. Michigan*, 547 U.S. 586, 596-99 (2006). Under the good-faith exception, the exclusionary rule applies only if the deterrent benefits of the exclusionary rule in a particular setting outweigh the social cost of lost criminal cases. *See Herring*, 129 S.Ct at 700. The exclusionary rule must "pay its way." *Id.* at 704 (quoting *United States v. Leon*, 468 U.S. 897, 907-08 n.6 (1984)).

The good-faith exception does not apply to searches that comply with subsequently-overturned precedent for two related reasons. First, the exclusionary rule "pays its way" by ensuring that the precedents the police follow are themselves correct. Constitutional enforcement requires two steps: The courts must correctly interpret the Constitution, and the police must properly follow the judiciary's instructions. The process breaks down if either side errs. If the good-faith exception is applied to reliance on overturned law, such a rule would eliminate the mechanism for defense counsel to argue for changes in the law that are necessary for the Supreme Court to set the proper direction of the law. Defendants will not challenge erroneous precedents knowing that they cannot benefit. If no challenges are brought, the Court will have no opportunity to make corrections.

The proper exercise of the judicial power therefore hinges on availability of the exclusionary rule. The exclusionary rule plays a critical role in deterring constitutional violations by making sure that the caselaw police enforce accurately interprets the Fourth Amendment.

Second, prior decisions on the good-faith exception are distinguishable because they all concern the use of the exclusionary rule to enforce existing law rather than to ensure the proper development of the law. Cases like *Leon*, *Krull*, and *Herring* properly limit the scope of the exclusionary rule when suppression is not needed to enforce existing law. Use of the exclusionary rule to develop the law works differently. There is no police "error." The police are simply doing their job. As a result, the exclusionary rule is not needed to ensure police compliance with existing law. The exclusionary rule applies in such settings for a different reason: It applies not to "punish" the police but to enable the adversary process upon which courts rely to interpret the Constitution correctly.

(A) Enforcing New Decisions Using The Exclusionary Rule Is Necessary For The Proper Exercise Of Judicial Power Needed To Deter Constitutional Violations.

The development of Fourth Amendment law relies on the adversary process. The Fourth Amendment requires reasonableness, which requires courts to

balance public safety interests articulated by the government with civil liberties interests articulated by the defense. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Courts then "say what the law is," declaring what the Constitution requires so the police can follow it. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Constitution is followed when the two branches of government perform their proper roles. The courts first must accurately say what the law is, and the police then must accurately enforce the law within the zone of power authorized by the courts.

The Supreme Court plays a unique role in the system of Fourth Amendment law. Every judge takes an oath to uphold the Constitution. Every judge, when called on, must interpret the Fourth Amendment. But the Constitution bestows upon the Supreme Court the ultimate responsibility to interpret the Fourth Amendment. While lower courts must follow the law, this Court does more: The Supreme Court has the power to recognize when prior law has veered off-course and to restore the law to its proper path. *See, e.g., Katz v. United States*, 389 U.S. 347, 353 (1967) (overturning *Olmstead v. United States*, 277 U.S. 438 (1928)).

The exclusionary rule provides the critical means to enforce the Constitution because it enables the correction of constitutional errors. The promise of freedom provides the incentive needed for defendants to challenge erroneous precedents. *See Stovall v. Denno*, 388 U.S. 293, 301 (1965) (recognizing that the

exclusionary rule must apply to cases announcing new rules to provide an "incentive of counsel to advance contentions requiring a change in the law"). In his classic *Harvard Law Review* article, frequently cited by this Court, Professor Mishkin explained the problem:

> The effective operation of the regular judicial process depends upon parties raising issues for decision and presenting (ordinarily through adversary argument) the considerations relevant to the wise resolution of those issues. The performance of these functions by litigants depends, not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment. When a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law.

Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965) (cited in *Stovall*, 388 U.S. at 301 n.4).

If the good-faith exception applied when an officer relies on clear circuit precedent, defendants would have no incentive to argue for a change in the law. By arguing for a change in the law, defendants would concede that they could not benefit from the change in law urged. The Government would win

either way. If the Court retained the prior decision, the Government would win on the merits. If the Court overturned the prior decision, the Government would win under the good-faith exception. Fourth Amendment litigation would become a game of "heads" the Government wins, "tails" the defense loses. Assuming that this dynamic would not eliminate Article III standing for challenges to existing precedents, it would largely end such challenges in practice because defendants would have no reason to raise the arguments in the first place.

Such an environment would be untenable because the Court needs defense counsel to raise constitutional challenges. In *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Court struck down a federal statute that barred legal services lawyers who accepted federal funds from bringing constitutional challenges to welfare laws. By "insulat[ing] the Government's laws from judicial inquiry," the Court noted, the law "threaten[ed] severe impairment of the judicial function." *Id.* at 546. "An informed, independent judiciary presumes an informed, independent bar," the Court explained. *Id.* at 545. Limiting claims by lawyers "distort[ed] the legal system" and amounted to a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Id.* at 544. "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon

which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

A similar principle applies here. The proper exercise of the judicial power requires defense lawyers to make arguments for their clients. The exclusionary rule provides the incentive to make such arguments by raising the prospect that a defendant might benefit if the law changes. Counsel for criminal defendants are officers of the Court, *Powell v. Alabama*, 287 U.S. 45, 73 (1932), and the exclusionary rule provides the incentive by which those officers of the Court make arguments that enable the Court to set the proper direction of Fourth Amendment jurisprudence. Eliminating the exclusionary rule in this setting would impose a "serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Velazquez*, 531 U.S. at 544. Enforcing new legal decisions through the exclusionary rule therefore "ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring).

It is theoretically possible – assuming Article III standing can be established – that some defense lawyers might continue to make arguments to change the law even if their own clients could not benefit from the change. It is hard to know how often this might happen, if it all. But even if lawyers tried to make such arguments, the quality of briefing likely

would be weak and the risk of poor decisionmaking high. That is true for two reasons. First, the lack of any genuine stake in the outcome would lessen the quality of arguments:

> [T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (internal quotations omitted). This will not occur if lawyers make arguments without any theoretical possibility of victory. *Stovall*, 388 U.S. at 301. *See also Pearson v. Callahan*, 129 S.Ct. 808, 820 (2009) (noting that requiring courts to decide the merits of Fourth Amendment questions when not outcome-determinative "may create a risk of bad decisionmaking" because it can lead to "cases in which the briefing of constitutional questions is woefully inadequate.").

Second, the fact that any new rule would be purely prospective would make it difficult to weigh accurately the costs of new restrictions on police conduct. Purely prospective rulemaking creates a

false impression that restrictions on the police have no cost. *See Harper*, 509 U.S. at 105 (Scalia, J., concurring) ("Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis" that was "formulated in the heyday of legal realism and promoted . . . as a means of making it easier to overrule prior precedent."). The fact that fewer wrongdoers will be convicted going forward is much less easily observed: It's hard to identify criminals who were never caught because searches that otherwise would have occurred never did. The exclusionary rule ensures that those costs are recognized and accounted for fully in the weighing of interests that Fourth Amendment law requires. *See Gant*, 129 S.Ct. at 1728 (Alito, J., dissenting) (noting the costs of the shift from *Belton* to *Gant*).

(B) The Development Of Fourth Amendment Law Is A Proper Concern Of The Exclusionary Rule Because Police Deterrence Requires Correct Precedents To Follow.

The Court of Appeals ignored the role of the exclusionary rule in the development of Fourth Amendment law because it concluded that such concerns were outside the proper concern of the exclusionary rule's scope. J.A. 119 n.8 ("We recognize that applying the good-faith exception under these circumstances may weaken criminal defendants' incentive to urge 'new' rules on the courts, but the exclusionary rule is designed to deter misconduct, not

to foster the development of Fourth Amendment law."). This conclusion is wrong both as a matter of precedent and common sense.

First, precedent recognizes that the exclusionary rule must enable constitutional development. In *Stovall*, the Court held that new rules must apply to the cases in which they are announced in part to provide an "incentive of counsel to advance contentions requiring a change in the law." 388 U.S. at 301 (citing Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965)). Although *Stovall's* balancing test for other cases on direct review was overturned by *Griffith*, this aspect of *Stovall* remains good law. Other cases on the scope of the exclusionary rule have also discussed the role of incentives to challenge police action. *See, e.g., Illinois v. Krull*, 480 U.S. 340, 353-54 (1987); *United States v. Leon*, 468 U.S. 897, 924, n.25 (1984). Although *Krull* and *Leon* involved contexts in which the exclusionary rule was not needed to create that incentive, both cases gave serious consideration to the role of incentives to bring Fourth Amendment challenges.

Second, the exclusionary rule must account for the development of the law because the ultimate goal of the exclusionary rule is "to enforce the Constitution's limits on government." Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule*, 83 Colum. L. Rev. 1365, 1384 (1983). The Constitution is not enforced when the police follow erroneous legal

decisions that authorize constitutional violations. Enforcement of the Constitution requires both the judiciary and the executive to serve their respective roles properly. The courts must interpret the Constitution correctly and the police must follow the announced rules accurately. If either branch errs, the police action will violate the Constitution. As a result, the deterrence calculus must account for the development of the law.

It may seem counterintuitive to speak of incentives in criminal litigation as matters of "deterrence." Judges are persuaded by force of reason rather than threat of penalty. But failure to correct mistaken precedents has the same impact as failure to follow correct ones. Incentives for counsel that enable courts to exercise the judicial power properly have the same effect on the enforcement of the Constitution as do direct threats of suppression that deter the police from ignoring existing law. As a result, litigation incentives that enable correction of constitutional errors are just as important to deterring constitutional violations as are police incentives to follow existing caselaw.

Arizona v. Gant is instructive. Before *Gant*, circuit courts "approve[d] routine constitutional violations." *Gant*, 129 S.Ct. at 1723. Police academies had widely trained officers to follow an incorrect rule. "Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result." *Id.* at 1722-23. Availability of the

exclusionary rule encouraged challenges to those circuit precedents, which allowed the Court to review and stop the unconstitutional searches in *Gant*. In the future, if rogue police officers decide to ignore *Gant*, courts will readily apply the exclusionary rule to enforce the Fourth Amendment rule it recognized. But the possible impact of using the exclusionary rule to deter violations by rogue officers following *Gant* is dwarfed by the proven impact of the exclusionary rule in prompting the Court to announce the *Gant* rule in the first place.

(C) No Other Remedy Provides A Mechanism To Correct Fourth Amendment Errors.

The exclusionary rule for new law is particularly important because no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine. Five alternative remedies must be considered: civil suits seeking damages against officers; civil suits seeking injunctive and declaratory relief; civil suits against municipalities; criminal prosecutions; and internal police discipline.

(1) Civil Suits Seeking Damages Against Officers. It would be pointless to argue for changes in Fourth Amendment doctrine in civil suits against officers seeking damages because the doctrine of qualified immunity applies. *See Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009). The doctrine of qualified immunity requires that the constitutional violation must be "clearly established at the time of the search" for the

suit to proceed. *Wilson v. Layne*, 526 U.S. 603, 606-07 (1999). This doctrine readily blocks civil litigation seeking to overturn precedent in favor of expanding constitutional protection. The reason is obvious. If binding caselaw at the time of the search says a search is actually *lawful*, it must be true that its illegality was not clearly established at the time of the search. *See Gant*, 129 S.Ct. at 1722, n.11 (confirming that qualified immunity will block civil suits for pre-*Gant* searches made in reliance on *Belton* "[b]ecause a broad reading of *Belton* has been widely accepted").

Thanks to qualified immunity doctrine, efforts to overturn precedent through civil damages actions against officers would not succeed. The district court would reject such a suit both on the merits and on qualified immunity grounds, and the court of appeals would do the same. The Supreme Court would then deny certiorari because any decision on the merits would be an advisory opinion without Article III standing. With this future outcome clear, no sensible attorney would file suit in the first place. Indeed, counsel is unaware of any Fourth Amendment civil suits seeking only damages from officers that have attempted to overturn circuit or Supreme Court precedent.

(2) Civil Suits Seeking Injunctive or Declaratory Relief. Civil suits seeking injunctive or declaratory relief cannot be used widely to challenge Fourth Amendment precedents due to the limitations of Article III jurisdiction. Under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a Fourth Amendment suit

seeking injunctive relief must show a real and immediate threat that a specific search or seizure will occur in the future. *Id.* at 105-07. Similarly, a plaintiff seeking declaratory relief in a Fourth Amendment civil case must show ongoing injury that would be redressed by the declaratory relief. *See Mayfield v. United States*, 599 F.3d 964, 969-73 (9th Cir. 2010). In either instance, the suit must also establish concretely what will happen to the plaintiff or each member of the plaintiff class in order to satisfy ripeness doctrine. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

These requirements effectively limit the role of civil actions for injunctive and declaratory relief in Fourth Amendment cases to challenges against specific ongoing programs that widely impact members of the public. The leading examples are roadblocks and drug-testing programs. The fact that members of the public are repeatedly searched under such programs enables class-action lawsuits seeking injunctive or declaratory relief that can satisfy Article III and prudential ripeness concerns. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (class action seeking injunctive relief for drug interdiction checkpoints). But this occurs only rarely. Most Fourth Amendment issues arise in the context of individual searches in criminal investigations. Because Fourth Amendment law is intensely fact-specific, every search or seizure will be different. As a result, civil lawsuits seeking injunctive or declaratory relief in the routine criminal setting will be readily dismissed

for failure to satisfy Article III and ripeness doctrine. *See Lyons*, 461 U.S. at 105-07; *Warshak v. United States*, 532 F.3d 521, 526-30 (6th Cir. 2008) (en banc) (Sutton, J.).

(3) Civil Suits Against Municipalities. Civil actions could be brought against municipalities on a failure-to-train theory. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). Such suits do not trigger qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Suits against municipalities cannot be brought to challenge existing precedent, however, because they require plaintiffs to establish "deliberate indifference to the rights of persons with whom the police come into contact." *Canton v. Harris*, 489 U.S. 378, 388 (1989). The police cannot be deliberately indifferent to rights that courts have not yet recognized.

(4) Criminal Prosecutions. Federal prosecutors can bring criminal charges under 18 U.S.C. § 242 for willful constitutional violations, including violations of the Fourth Amendment. This criminal statute cannot be used to develop Fourth Amendment law, even assuming the Justice Department would try. Prosecutions under § 242 require that any constitutional violation must first be clearly established using the standard of qualified immunity law. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997). More fundamentally, using criminal prosecutions to charge conduct that is actually deemed lawful at the time of the search would violate the Ex Post Facto clause. *See* U.S. Const. Art. I, § 9, cl. 3.

(5) *Internal Discipline*. Internal police disciplinary proceedings cannot develop the law for two reasons. Although disciplinary procedures can encourage police compliance with existing law, *see Hudson*, 547 U.S. at 598-99, they have no role in developing the law in the appellate courts. Second, an officer who conducts a search considered lawful at the time does not deserve discipline. He is not personally at fault for the constitutional violation that occurred.

(D) The Good-Faith Cases Of *United States v. Leon*, *Illinois v. Krull*, And *Herring v. United States* Are Distinguishable Because They Concern Enforcement Of Existing Law Rather Than The Development Of The Law.

The Court of Appeals relied on three cases about the good-faith exception to the exclusionary rule: *United States v. Leon*, 468 U.S. 897 (1984), *Illinois v. Krull*, 480 U.S. 340 (1987), and *Herring v. United States*, 129 S.Ct. 695 (2009). These cases are distinguishable because the good-faith exception deals with ensuring compliance with existing precedents instead of correcting erroneous precedents. The issue in this case is how to ensure that the Supreme Court can correct constitutional errors, not how to ensure compliance with existing law. Because that problem was not implicated in *Leon*, *Krull*, or *Herring*, those cases are distinguishable and their statements about the exclusionary rule must be viewed in the context in

which they arose. The good-faith exception developed in those cases does not apply here.

Leon, *Krull*, and *Herring* all consider whether the exclusionary rule is justified when the police rely on sources other than caselaw to gauge the lawfulness of a search or seizure. For example, an officer might rely on a report from a local police database that there is a warrant for a suspect's arrest to justify arresting that suspect. *See Herring*, 129 S.Ct. at 698. Alternatively, he might rely on a magistrate's decision to sign a search warrant to conclude that the described search will be lawful. *See Leon*, 468 U.S. at 902. Similarly, he might rely on a state law permitting a search as evidence that the search satisfies the Fourth Amendment. *See Krull*, 480 U.S. at 342-43. Unfortunately, these sources of guidance sometimes prove unreliable. A police database may contain a bookkeeping error; a magistrate may misread a warrant application; and a legislature may inadvertently authorize an unlawful search. *Leon*, *Krull*, and *Herring* consider when police reliance on one of these erroneous sources justifies the exclusionary rule.

Leon, *Krull*, and *Herring* focus on whether an exclusionary rule will encourage the following of existing Fourth Amendment law. The cases recognize that suppression of evidence normally will not encourage clerks, magistrates, and legislators to be more careful. Magistrates already have "professional incentives to comply with the Fourth Amendment." *Leon*, 468 U.S. at 917. Legislators care about "enact[ing] statutes for broad, programmatic purposes"

and thus would be deterred by invalidation of their statutes rather than suppression of evidence. *Krull*, 480 U.S. at 352. And absent some sign that a police error in a database was caused by more than garden-variety negligence, a suppression remedy would not substantially improve the accuracy of police databases. *Herring*, 129 S.Ct. at 703.

Because an exclusionary rule is not needed for clerks, magistrates, or legislators to follow existing law, the cases focus exclusively on deterrence of police misbehavior as a justification for the exclusionary rule. They reason that the police are culpable only if the error by the clerk, magistrate, or legislature is an obvious one that the police should realize based on then-existing law. In that case, the exclusionary rule applies because a reasonable police officer should spot the error. *See Leon*, at 468 U.S. at 919-20; *Krull*, 480 U.S. at 355; *Herring*, 129 S.Ct. at 703. On the other hand, if the error by the clerk, magistrate, or legislature is a minor one, it is reasonable for the officer to rely on it and the exclusionary rule does not apply. *See Leon*, 468 U.S. at 914-15; *Krull*, 480 U.S. at 358-59; *Herring*, 129 S.Ct. at 703-04.

Leon, *Krull*, and *Herring* are distinguishable from the present case because they concern compliance with existing precedents rather than compliance with the Constitution. The cases assume that the current state of Fourth Amendment caselaw is correct and fixed. They then consider how the exclusionary rule can ensure compliance with that fixed law

among clerks, magistrates, legislators, and the police. This case is different. In this case, the state of Fourth Amendment caselaw is dynamic. The goal is to ensure the correct interpretation of the law by appellate courts. The scope of the exclusionary rule must be determined by the incentives needed to facilitate the adversary process and enable the correction of constitutional errors.

This is a different question from that raised by *Leon*, *Krull*, and *Herring* because database clerks, magistrates, and legislators play no role in the development of Fourth Amendment law. Database clerks simply report on warrants in the database. Magistrates just review warrant applications in brief ex parte proceedings. Legislatures only enact statutes. As a result, *Leon*, *Krull*, and *Herring* do not consider the future course of Fourth Amendment jurisprudence. None implicate "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While their holdings are correct for the question that they answered, those cases did not concern the impact of the exclusionary rule on the adversary process. Because *Leon*, *Krull*, and *Herring* do not implicate this question, their statements must be limited to the context of the issues that they actually decided.

A few specific statements from those cases are worth addressing in detail. First, *Leon* states that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 468 U.S. at 916. This statement

must be understood in context. The relevant passage of *Leon* was concerned with whether the exclusionary rule should apply when judges and magistrates issue warrants improperly. Review of a warrant application is not an exercise in developing the law. In the state system, many magistrates are not even lawyers. *See Shadwick v. City of Tampa*, 407 U.S. 345, 349-50 (1972). As a result, *Leon*'s statement that the exclusionary rule is not designed to punish the errors of judges refers only to the errors of judges and magistrates *in issuing warrants*. That statement should not be yanked out of context and treated as signaling a broad theory of the exclusionary rule and legal error. Such a broad reading would be particularly untenable because *Leon* approvingly cites *Stovall*, which concluded that the exclusionary rule must apply in the decision announcing a new rule to provide the "incentive of counsel to advance contentions requiring a change in the law." *Stovall*, 388 U.S. at 301.

Herring v. United States also contains several statements that must be understood in the context of enforcing existing law. "To trigger the exclusionary rule," *Herring* explained, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 129 S.Ct. at 702. The Court continued: "[W]hen police mistakes are the result of negligence . . . , rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way." *Id.* at 704 (internal

quotations omitted). These statements make sense when the goal is to enforce existing law. In such cases, "police mistakes" lead to a constitutional violation. The constitutional violation is measured by reference to existing law. The more deliberate and culpable the police error, the more the threat of suppression can lead the police to recognize the error and change course to better follow existing law.

The same principles do not justify an exception to the exclusionary rule when the police rely on erroneous appellate precedents. When the police rely on existing caselaw, they are not making "mistakes [that] are the result of negligence . . . rather than systemic error." *Id.* at 704. The police are not negligent at all, as the court blundered rather than the constable. In this case, the police have made a "systemic error" – an error incorporated into the legal training they first received at "police academies and that law enforcement officers have relied on" over time. *Gant*, 129 S.Ct. at 1722. The absence of police culpability does not mean that police conduct follows the Constitution, however. Erroneous precedents may authorize constitutional violations unbeknownst to the police. Supreme Court correction of those errors requires the exclusionary rule even though the police are not at fault. The exclusionary rule applies in such settings not to "punish" the police but rather to foster the adversary process upon which courts rely to interpret the Constitution accurately.

Leon and *Herring* cannot be faulted for failing to recognize these limitations on the language they

employed. The scope of the exclusionary rule for new decisions has in the past been considered a question of retroactivity law, which recent precedents of this Court rightly have considered settled. *See, e.g., Danforth*, 552 U.S. at 271-75. But the broader perspective of the exclusionary rule implicated by this case reveals that the statements in *Leon* and *Herring* must be read as limited to the enforcement of existing law. When the exclusionary rule is needed to punish the police for flouting existing law, some culpability is necessary before the exclusionary rule is justified. When the exclusionary rule is needed to develop the law, however, the police are not at fault. The Supreme Court does not "punish" police officers when the Court recognizes that circuit precedent has gone astray and must be corrected. In these instances, suppression implies no assignment of blame.

IV. THE COSTS OF THE EXCLUSIONARY RULE ARE MODEST WHEN A COURT OVERTURNS PRECEDENT BECAUSE MANY SEARCHES WILL REMAIN CONSTITUTIONAL AND EIGHT DOCTRINES ALREADY SHARPLY LIMIT THE OPERATION OF THE EXCLUSIONARY RULE.

The good-faith exception requires the benefits of deterrence to be weighed against the social cost of the exclusionary rule – principally, that some people who are guilty may not be punished. *See Herring*, 129 S.Ct. at 700-01. The costs of the exclusionary rule when courts overturn Fourth Amendment precedents

are modest for two reasons. First, the fact that the Court recognizes a change in the interpretation of the Fourth Amendment does not mean that searches made in reliance on the prior law violate the Constitution. In many cases, the searches will be constitutional under the new test or under some other theory of Fourth Amendment reasonableness. The pre-*Gant* searches that violated the rule announced in *Gant* provide helpful illustrations: Many (perhaps most) of those searches have been deemed lawful under either the automobile exception or the inventory search exception.

Second, even if a search did violate the Constitution, the actual set of cases in which relief will be granted usually will be quite small. Even where the exclusionary rule is available in theory, it is still full of holes: The fact that it is available does not mean it will be applied often. To obtain the benefit of the exclusionary rule, a defendant whose rights were violated must satisfy eight different doctrinal tests: 1) Inevitable discovery; 2) Independent source; 3) Attenuated basis; 4) Standing; 5) The good-faith exception for the type of violation; 6) The availability of the exclusionary rule for that type of legal proceeding; 7) Plain error; and 8) Harmless error. Because most defendants will fail at least one of the doctrines, relatively few defendants who have the benefit of the exclusionary rule in theory will obtain relief in fact.

(A) Searches Made In Reliance On Overturned Precedent Will Often Be Constitutional Even Applying The New Decision.

The fact that the Supreme Court recognizes expanded Fourth Amendment protection in one area does not mean that searches made in reliance on prior law necessarily violate the Fourth Amendment. In many cases, the search will happen to satisfy the new rule. Even if the search violates the new rule, Fourth Amendment law gives the Government several bites at the apple: A search that cannot be justified on one ground can be justified on another. In many cases, alternative Fourth Amendment exceptions will apply and render the search constitutional. No criminals will be set free in any of these cases.

The recent lower court decisions applying *Arizona v. Gant* to pre-*Gant* searches confirm the dynamic. In many instances, lower courts have applied the new rule of *Gant* and concluded that pre-*Gant* searches were constitutional because they satisfied the "search incident to arrest" test announced in *Gant*. *See, e.g.*, *Brown v. State*, 24 So.3d 671, 677 (Fla.App. 2009) (approving pre-*Gant* search under *Gant* because defendant was arrested for theft and there was "reason to believe" stolen property was in car); *State v. Cantrell*, 233 P.3d 178, 185-86 (Idaho App. 2010) (same result for a pre-*Gant* DUI arrest); *United States v. Cole*, 2010 WL 3210963 (N.D.Ga. 2010) (same for pre-*Gant* drug arrest).

Additional lower court decisions have applied other Fourth Amendment exceptions to validate pre-*Gant* searches made in reliance on *Belton*. Under the so-called "automobile exception," probable cause to believe evidence of crime is inside the car justifies a warrantless search of the car. *See Wyoming v. Houghton*, 526 U.S. 295 (1999). Many lower court decisions have held that pre-*Gant* searches made in reliance on *Belton* did not violate the Fourth Amendment because the facts triggered the automobile exception. *See, e.g., United States v. Evans*, 2009 WL 2230924 (C.D.Cal. 2009); *United States v. Deal*, 2009 WL 5386061 (M.D.Fla. 2009); *Meister v. State*, 912 N.E.2d 412 (Ind. App. 2009) (on remand after GVR following *Gant*); *United States v. Grooms*, 602 F.3d 939 (8th Cir. 2010) (same); *United States v. Webster*, ___ F.3d ___, 2010 WL 4366379 (8th Cir. 2010); *State v. Hobbs*, 933 N.E.2d 1281, 1286-87 (Ind. 2010).

Other lower court decisions have held that pre-*Gant* searches were constitutional under the so-called "inventory search" exception. The inventory search exception permits officers to search cars that are impounded following an arrest so long as they follow standardized procedures. *See Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987). Many lower courts have held that pre-*Gant* automobile searches made in reliance on the *Belton* rule were constitutional because the inventory search exception applied. *See, e.g., United States v. McGhee*, 672 F.Supp.2d 804, 814 (S.D.Ohio 2009); *United States v. Rollins*, 2010 WL 3843776 (E.D.Tenn. 2010); *People v. Mason*, 935 N.E.2d 130,

137 (Ill.App. 2010); *Moskey v. State*, ___ S.W.3d ___, 2010 WL 4484190 (Tex.App. 2010); *State v. Townsend*, 40 So.3d 103, 106 (Fla.App. 2010).

(B) Eight Different Doctrines Sharply Limit The Number Of Cases In Which Defendants Obtain Relief For Unconstitutional Searches Made In Reliance On Overturned Law.

Even where a search is recognized as unconstitutional, courts will actually provide a remedy to a criminal defendant in only a small number of cases. Eight distinct doctrines limit the scope of the exclusionary rule. Collectively, these doctrines sharply limit the number of cases in which courts will grant relief to a defendant who has been the subject of an unconstitutional search.

(1) Inevitable Discovery. Under the inevitable discovery exception, the exclusionary rule does not apply to unconstitutionally obtained evidence if the government can show by a preponderance that it would have obtained the information through alternative constitutional means if the constitutional violation had not occurred. *See Nix v. Williams*, 467 U.S. 431 (1984). Recent cases involving pre-*Gant* searches illustrate the power of this doctrine. In the months since *Arizona v. Gant*, many lower courts have held that the fruits of pre-*Gant* searches were admissible because the evidence would have been inevitably discovered through some other constitutional means.

See, e.g., United States v. Bradford, 2009 WL 3754174 (E.D.Wis. 2009); *United States v. Page*, 679 F.Supp.2d 648, 654 (E.D.Va. 2009); *United States v. Engle*, 677 F.Supp.2d 879, 888 (E.D.Va. 2009); *United States v. Owen*, 2009 WL 2857959 (S.D.Miss. 2009).[1]

(2) Independent Source. Under the independent source exception, the exclusionary rule does not apply to unconstitutionally obtained evidence if the evidence was actually obtained through some alternative constitutional means. *See Murray v. United States*, 487 U.S. 533, 541 (1988). The independent source exception does not often apply to an automobile search such as this case and other post-*Gant* cases, but it often applies to other kinds of search and seizure cases to admit evidence following a Fourth Amendment violation.

(3) Attenuated Basis. Under the attenuated basis exception, the exclusionary rule does not apply if the evidence obtained was not a "fruit of the poisonous tree" because there were intervening events that attenuated the taint. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Together with the inevitable discovery exception and the independent source exception, the attenuated basis exception poses a causation inquiry: An unconstitutional search

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[1] The District Court in this case concluded that the inevitable discovery doctrine applied even if Davis should receive the benefit of the forthcoming decision in *Gant*. J.A. 98. The Court of Appeals did not reach this issue. J.A. 109 n.1.

does not trigger the exclusionary rule unless the unconstitutional search was both the "but for" and the proximate cause of the discovery of evidence by the police. *See Hudson v. Michigan*, 547 U.S. 586, 592-93 (2006).

(4) Standing. The scope of the exclusionary rule will be further limited by the requirement that a defendant show that his own rights, and not those of a third party, were violated. If an unconstitutional search leads to evidence against a defendant, but the defendant did not have privacy rights in the place or thing searched, the exclusionary rule is unavailable. *See Rakas v. Illinois*, 439 U.S. 128, 148-50 (1978). Several lower courts have used this doctrine to reject the exclusionary rule for pre-*Gant* searches made in reliance on lower court interpretations of *Belton*. *See, e.g., United States v. Ferguson*, 667 F.Supp.2d 567, 572 (M.D.N.C. 2009) (unauthorized driver could not challenge *Belton* search of car); *People v. Frias*, 912 N.E.2d 1236, 1241-42 (Ill.App. 2009) (driver could not challenge search of passenger's property found in car during *Belton* search); *United States v. Bronner*, 2009 WL 1748533 (D.Minn. 2009) (passenger could not challenge *Belton* search of car).

(5) Good-faith Exception for the Type of Violation. The good-faith exception developed in cases like *United States v. Leon* limits the scope of the exclusionary rule to those types of Fourth Amendment violations that require suppression as a remedy. When the Supreme Court overturns precedent and recognizes expanded constitutional protection, the

newly-recognized protection may or may not be sufficiently integral to the enforcement of the Fourth Amendment as to warrant suppression for violations. If the newly-recognized rights need not be enforced by the exclusionary rule, the exclusionary rule will not apply.

The remedy for knock-and-announce violations provides an illustration. The Supreme Court first held that the Fourth Amendment ordinarily requires the police to knock and announce their presence when executing a warrant in *Wilson v. Arkansas*, 514 U.S. 927 (1995). Two years later, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court invalidated widely-adopted practices among state police forces by holding that the knock-and-announce rule applies in felony drug investigations. *See id.* at 388. *Richards* raised the prospect that fruits of many state searches would be suppressed because they were executed in reliance on state court decisions that *Richards* rejected. That prospect was thwarted a few years later when the Court held that the exclusionary rule does not apply to knock-and-announce violations. *See Hudson v. Michigan*, 547 U.S. 586, 592-93 (2006). Because the exclusionary rule was not needed to deter violations of the knock-and-announce rule, the Court's expansion of Fourth Amendment protection to encompass the knock-and-announce rule did not trigger the exclusionary rule.

(6) Availability of the Exclusionary Rule for the Type of Proceeding. The traditional cost/benefit approach to the exclusionary rule has been used to limit

the type of proceedings in which the exclusionary rule is available. Under this framework, the exclusionary rule is not available in habeas corpus proceedings, *see Stone v. Powell*, 428 U.S. 465 (1976); in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974); in parole board hearings, *see Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998); or at sentencing hearings in criminal cases, *see United States v. Brimah*, 214 F.3d 854, 858-859 (7th Cir. 2000) (joining nine other circuits in holding that "in most circumstances, the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings"). The only proceedings at which the exclusionary rule is clearly available are criminal trials and direct appeals. *See Stone*, 428 U.S. at 493.

(7) Plain Error. The plain-error standard also limits the scope of the exclusionary rule for new Fourth Amendment decisions. If existing precedent clearly permits a search, defendants understandably may not file a motion to suppress challenging it. Failure to object to a search ordinarily triggers plain error review. *See* Fed. R. Crim. P. 52(b); *United States v. Young*, 470 U.S. 1, 15-16 (1985). The fact that an error was not recognized at the time of the trial may keep it from being "plain," however. The result is a Catch-22: Defendants won't know to challenge the search because it was considered lawful at the time of trial, but the fact that it was considered lawful at the time of trial means no relief can be granted. Two federal circuits have adopted this rationale to reject

Fourth Amendment challenges to *Belton* searches that were not challenged before *Arizona v. Gant* was handed down. *See United States v. Deitz*, 577 F.3d 672, 687-688 (6th Cir. 2009); *United States v. Rumley*, 588 F.3d 202, 205 n.1 (4th Cir. 2009). *See also State v. Millan*, 212 P.3d 603, 606-7 (Wash.App. 2009) (same result under state review standards). *But see State v. McCormick*, 216 P.3d 475, 477 (Wash.App. 2009) (disagreeing with *Millan*).

(8) Harmless Error. On top of all of these other doctrines, a conviction obtained in part through the admission of evidence obtained in violation of the Fourth Amendment will be subject to harmless error analysis. *See Chapman v. California*, 386 U.S. 18, 22 (1967). If evidence wrongly admitted was not central to a conviction, the conviction can be upheld despite the improper admission of evidence obtained in violation of the Fourth Amendment. Like many of the other doctrines, this doctrine has been used to limit the impact of the exclusionary rule for pre-*Gant* searches made in reliance on the *Belton* rule. *See, e.g., State v. Roberts*, 2010 WL 3945101 (Wash.App. 2010) (upholding conviction for trafficking in stolen puppies despite improper admission of stolen puppy found in car during *Belton* search because there was considerable evidence of trafficking in stolen puppies beyond fruits of unlawful search).

(C) The Benefits Of The Exclusionary Rule For Overturned Precedents Outweigh Its Costs.

Comparing the benefits of the exclusionary rule to its costs, the exclusionary rule for searches consistent with overturned precedents "pay[s] its way." *Herring*, 129 S.Ct at 704 (quoting *Leon*, 468 U.S. at 907-08 n.6). The benefits of the exclusionary rule in this setting are great: The exclusionary rule provides the linchpin that enables the proper development of Fourth Amendment law and the correction of constitutional errors. The exclusionary rule is the tool that the Supreme Court needs to ensure that the law remains on its proper path.

On the other hand, the costs are relatively modest. An exclusionary rule for searches made pursuant to overturned precedents will only infrequently lead to defendants going free. For a criminal defendant, the availability of the exclusionary rule is only the beginning. A long trail of doctrines must be navigated before any actual relief will be granted. These limiting doctrines expressly recognize the cost/benefit framework governing the exclusionary rule, and they narrow the exclusionary rule to its core in a way that greatly minimizes its costs. The only defendants who receive the benefit of the exclusionary rule will be a subset of the defendants who never would have been searched in the first place had the Fourth Amendment been followed. The new Fourth Amendment rule will have recognized that the costs of lost cases is a cost worth bearing *ex ante*. The same costs are also

worth bearing *ex post* for the cases not yet final at the time of the new decision.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

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No. 09-11328

In the Supreme Court of the United States

WILLIE GENE DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether evidence is admissible under the good-faith exception to the exclusionary rule when the evidence was obtained during a search that was conducted in objectively reasonable reliance on binding appellate precedent holding such searches lawful under the Fourth Amendment, but, after the search, that precedent was overturned by this Court.

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In the Supreme Court of the United States

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WILLIE GENE DAVIS, PETITIONER

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Alabama, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 220 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 107-123.

1. On April 27, 2007, Officer Kenneth Hadley of the Greenville Police Department conducted a routine stop of the car in which petitioner was a passenger. J.A. 99-100. The driver failed sobriety tests, was arrested, and was placed in a police vehicle. J.A. 100, 108.

Meanwhile, Corporal Curtis Miller arrived on the scene and asked petitioner for his name. J.A. 99-100. Petitioner hesitated before stating, "Ernest Harris."

J.A. 100, 108. Corporal Miller noted petitioner's slurred speech and smelled alcohol on petitioner's breath. *Ibid.* Petitioner was also fidgeting with his pockets and ignored instructions to stop moving his hands in and out of his pockets. *Ibid.*

Corporal Miller asked petitioner to exit the car. J.A. 100, 108. When petitioner began removing his jacket, Corporal Miller told him to leave it on. *Ibid.* Despite that instruction, petitioner zippered his pocket shut, removed his jacket, and left it on the seat. *Ibid.* Corporal Miller patted petitioner down and asked bystanders whether petitioner's name was Ernest Harris. *Ibid.* An onlooker identified petitioner as Willie Davis, and Corporal Miller's police dispatcher confirmed that identity. *Ibid.* Corporal Miller then arrested petitioner for providing a false name to a law-enforcement officer, handcuffed him, and put him in the back of a patrol vehicle. J.A. 100-101, 108. Corporal Miller searched the car incident to the arrests and discovered a revolver in petitioner's jacket pocket. J.A. 101, 108-109.

The officers impounded the car. J.A. 101. Pursuant to Greenville Police Department policy, they conducted an inventory search and prepared a report of the car's contents. J.A. 69-70, 101, 104-105.

2. Following his indictment (J.A. 8-9), petitioner moved to suppress the revolver. J.A. 10-16. Petitioner acknowledged that he "would not prevail under existing Eleventh Circuit precedent," J.A. 13-15 (discussing *United States* v. *Gonzalez*, 71 F.3d 819 (1996), and *United States* v. *Diaz-Lizaraza*, 981 F.2d 1216 (1993)), but requested a hearing to preserve the issue for review in light of *Arizona* v. *Gant*, No. 07-542, which was then pending before this Court. J.A. 15.

A magistrate judge held an evidentiary hearing and recommended that the suppression motion be denied. J.A. 99-106. The judge concluded that the revolver was discovered during a valid search incident to arrest under *New York* v. *Belton*, 453 U.S. 454 (1981). J.A. 102-103. The judge explained that "the Eleventh Circuit has long repeated the rule from *Belton*, firmly establishing arresting officers' ability to conduct a contemporaneous warrantless search of a passenger compartment and containers" and noted that "[b]oth parties agree that current law squarely covers these facts." J.A. 103. The judge additionally determined "[t]he officers inevitably would have discovered the evidence in the routine inventory search" that they properly executed "under Greenville Police policy." J.A. 104-105.

The district court adopted the magistrate judge's recommendation and denied petitioner's motion. J.A. 96-99. The court concluded both that "the search incident to the arrest" was lawful "under binding Eleventh Circuit case law," J.A. 96-97 (citing *Gonzalez*), and, in any event, that the revolver "would have inevitably been discovered during the inventory search." J.A. 98.

In May 2008, a jury found petitioner guilty of possessing a firearm after having been convicted of a felony. J.A. 4, 109. In November 2008, the district court sentenced petitioner and entered a judgment of conviction. J.A. 5.

3. While petitioner's appeal was pending, this Court issued its decision in *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). *Gant* recognized that lower courts had "widely understood" *Belton* "to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court further

noted that the lower-court decisions reading *Belton* to permit searches conducted after the vehicle's recent occupant had been arrested, handcuffed, and placed in a police vehicle were "legion." *Id.* at 1718, 1722 n.11 (quoting *Thornton* v. *United States*, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment)).

This Court, however, read *Belton* more narrowly. *Gant* held that a search incident to the lawful arrest of a vehicle's recent occupant may include the vehicle's passenger compartment under *Belton* only when the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). *Gant* thus "reject[ed]" the lower courts' widely accepted understanding of *Belton*. *Ibid.*

4. The court of appeals subsequently affirmed. J.A. 107-123. The court held that "the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned." J.A. 114.

The court of appeals explained that, when the officer conducted the search in this case, the search was "permitted by [its] decision in *United States* v. *Gonzalez*." J.A. 107. And *Gonzalez*, like decisions from other courts, "had read *Belton* to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment." J.A. 110; see J.A. 122. The court concluded that *Gant* "rejected that prevailing reading of *Belton*," J.A. 110, and that a Supreme Court decision like *Gant* that "construe[s] the Fourth Amendment

[must] be applied retroactively to all convictions that [are] not yet final at the time the decision was rendered." J.A. 111-112 (quoting *United States* v. *Johnson*, 457 U.S. 537, 562 (1982)). The court accordingly determined that the search here was unlawful because it "violated [petitioner's] Fourth Amendment rights as defined in *Gant*." J.A. 112.

The court of appeals, however, recognized that its Fourth Amendment holding did not "dictate the outcome of th[e] case" because suppression "is 'an issue separate from the question whether the Fourth Amendment'" was violated. J.A. 113 (quoting *United States* v. *Leon*, 468 U.S. 897, 906 (1984)). The exclusionary rule's remedy of suppression, the court explained, "is not an individual right." J.A. 117 (quoting *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009)). Instead, suppression is justified "only where it 'result[s] in appreciable deterrence'" and "'the benefits of deterrence * * * outweigh the costs.'" *Ibid.* (quoting *Herring*, 129 S. Ct. at 700) (brackets in original). Suppression therefore "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct" and "should not be applied[] to deter objectively reasonable law enforcement activity." *Ibid.* (quoting *Herring*, 129 S. Ct. at 698; *Leon*, 468 U.S. at 919).

Based on those principles, the court of appeals held that suppression was unwarranted because "the exclusionary rule is justified solely by its potential to deter police misconduct"; the "offending officer reasonably relied on [the court of appeals'] well-settled precedent"; and "'penalizing the officer for the court's error'" in construing *Belton* before *Gant* "'cannot logically contribute to the deterrence of Fourth Amendment viola-

tions.'" J.A. 118-119 (quoting *Leon*, 468 U.S. at 921) (brackets omitted).[1]

SUMMARY OF ARGUMENT

The good-faith exception to the exclusionary rule applies when officers obtain evidence during a search conducted in objectively reasonable reliance on binding circuit precedent that is later overturned.

I. The exclusionary rule serves a single purpose: to deter police misconduct. A Fourth Amendment violation is fully accomplished by the unlawful search, and the admission of evidence found in that search does not violate the Fourth Amendment. The exclusionary rule seeks, instead, to deter future police misconduct. Because the costs of excluding incriminating evidence are severe, exclusion can be justified only when it results in non-speculative and appreciable deterrence that outweighs those costs.

In *United States* v. *Leon*, 468 U.S. 897 (1984), this Court reasoned that, because the exclusionary rule is designed only to deter future misconduct, suppression cannot further the rule's ends in any appreciable way if the officer's conduct was objectively reasonable. *Id.* at 916, 919-920. In that situation, the suppression of evidence at trial will have no deterrent affect. *Id.* at 919. The Court has applied the good-faith exception to objectively reasonable (but unconstitutional) searches under

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[1] The court of appeals noted the district court's alternative holding that "[the] police would inevitably have discovered [petitioner's] gun during an inventory search" but found it "unnecessary to address the inventory-search issue" in light of its "holding with respect to the exclusionary rule's good-faith exception." J.A. 109 n.1. If this Court were to reverse the basis for the court of appeals' judgment, the inevitable-discovery/inventory-search issue would remain open on remand.

warrant, searches in reliance on a statute later declared unconstitutional, and searches incident to arrests made in reliance on police databases containing errors attributable to courts or isolated police negligence.

The same logic applies when an officer relies on binding appellate precedent. An officer acts objectively reasonably in conducting a search that the relevant court has endorsed, even if that precedent is later overturned. Suppression in this context therefore yields no appreciable deterrence and exacts grave social costs. Accordingly, under this Court's precedents, suppression is unwarranted.

II. Petitioner argues that this Court should exclude evidence not because it will deter police misconduct but, instead, because it will provide criminal defendants with an incentive to challenge existing Fourth Amendment jurisprudence. That submission should be rejected for three principal reasons.

First, the exclusionary rule has always been grounded in a single principle: the deterrence of police misconduct. This Court has repeatedly rejected requests to depart from that justification. Petitioner's proposal should fare no better.

Second, even if petitioner's incentive rationale were a type of "deterrence" to be furthered by the exclusionary rule, any marginal benefits that might result do not qualify as the "appreciable" deterrence necessary to justify suppression. This Court correctly rejected similar incentive-based arguments in *Leon* and *Krull*. Defendants will continue to have sufficient incentives to litigate meritorious claims because the potential benefit from suppression is enormous and the cost of seeking suppression is small. Furthermore, as *Leon* held, courts will have Article III jurisdiction to entertain claims of

Fourth Amendment violations even when the good-faith exception applies. And the likelihood that unconstitutional police practices will escape this Court's review is remote given the multiplicity of jurisdictions in which criminal defendants can bring such challenges, including 12 courts of appeals and 50 state jurisdictions.

Civil suits provide additional opportunities to review appellate precedents. For example, municipalities are likely to train their officers to conduct searches consistent with binding appellate precedents or to have a widespread custom amongst their offices of compliance. Such municipalities are subject to suit under 42 U.S.C. 1983, successful plaintiffs recover attorney's fees, and qualified immunity is not a defense.

Third, even if petitioner's incentive-based rationale could produce appreciable deterrence, it would not outweigh the costs. Those costs include not only injuring the truthfinding function of trials and releasing guilty defendants, but also damaging to the public's perception of justice and chilling valid police activity vital to public safety. If officers cannot rely on existing precedent, they will be inclined to curtail or delay legitimate actions important for protecting the public. The total cost of suppressing reliable incriminating evidence obtained in reasonable reliance on appellate precedent far outweighs any marginal benefits from petitioner's incentive-based theory of suppression.

III. Rather than rely on this Court's good-faith decisions, petitioner relies on the Court's retroactivity jurisprudence to conclude that evidence must be suppressed when the relevant search was based on binding appellate precedent that was later overturned. But those retroactivity decisions address a different issue. The Court's holding in *Griffith* v. *Kentucky*, 479 U.S.

314 (1987), that new rules apply to all cases on direct review flows from the Court's analysis of the nature of the judicial process and a concern to treat similarly situated litigants the same. It does not turn on the policies animating the exclusionary rule. Petitioner also errs in suggesting that the good-faith argument made in this case is the same one rejected by the Court in a pre-*Griffith* retroactivity decision. To the contrary, the Court accepted a similar argument in another pre-*Griffith* decision in which evidence had been acquired in reliance on settled law that this Court later overturned. See *United States* v. *Peltier*, 422 U.S. 531, 535 (1975). The considerations animating *Peltier* are not a part of current retroactivity law, but they are reflected in the good-faith exception. And, contrary to petitioner's contention, *Leon* and *Krull*'s good-faith rationales are not limited to enforcing "existing law," but reflect a deeper principle: that the exclusionary rule should not be applied where it serves no deterrent purpose. That is the case here.

ARGUMENT

EVIDENCE SEIZED IN OBJECTIVELY REASONABLE RELIANCE ON APPELLATE COURT PRECEDENT IS ADMISSIBLE UNDER THE GOOD-FAITH EXCEPTION

This Court has repeatedly made clear that the sole purpose of the Fourth Amendment exclusionary rule is to deter police misconduct. When the police act in objectively reasonable reliance on existing law, suppression would not serve that purpose. Accordingly, even when the Fourth Amendment is violated, this Court has upheld the admission of evidence from searches under warrant, *United States* v. *Leon*, 468 U.S. 897 (1984), searches authorized by statute, *Illinois* v. *Krull*, 480 U.S. 340 (1987), and searches incident to arrests resulting from

flawed police-database information attributable to court employees, *Arizona* v. *Evans*, 514 U.S. 1 (1995), or isolated, negligent police error, *Herring* v. *United States*, 129 S. Ct. 695 (2009). Under the principles of those decisions, evidence derived from a search undertaken in reasonable reliance on binding appellate precedent does not warrant suppression; the officer has acted entirely in accordance with existing law and has committed no misconduct to deter. Applying this principle will neither stultify Fourth Amendment law nor return to a rejected regime for measuring the retroactive effect of new rules of criminal procedure. Instead, it will properly limit the enormous costs to the truthseeking process, which the exclusionary rule inevitably imposes, by confining exclusion to those contexts in which its deterrent rationale applies.

I. SUPPRESSION DOES NOT SERVE THE PURPOSES OF THE EXCLUSIONARY RULE WHEN AN OFFICER CONDUCTED A SEARCH IN OBJECTIVELY REASONABLE RELIANCE ON BINDING APPELLATE PRECEDENT THAT, AFTER THE SEARCH, IS OVERTURNED BY THIS COURT.

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. "[N]o provision," however, "expressly preclud[es] the use of evidence obtained in violation of [the Amendment's] commands," *Herring*, 129 S. Ct. at 699 (quoting *Evans*, 514 U.S. at 10). Instead, the Fourth Amendment exclusionary rule is a "judicially created remedy" that was "designed to deter police misconduct rather than to punish the errors of judges." *Leon*, 468 U.S. at 906, 916 (citation omitted). The exclusionary rule therefore cannot apply when there is no police misconduct to deter. That

is the case when a search proceeds in objectively reasonable reliance on binding precedent.

A. The Exclusionary Rule Was Designed To Apply Only When The Exclusion Of Evidence Can Appreciably Deter Police Misconduct And When Such Deterrence Justifies The Substantial Social Costs Of Exclusion

This Court has "emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 362 (1998). "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself." *Leon*, 468 U.S. at 906 (quoting *United States* v. *Calandra*, 414 U.S. 338, 354 (1974)). The exclusionary rule, therefore, "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered'" from an unlawful search or seizure. *Ibid.* (quoting *Stone* v. *Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting) (*Powell*)).

Rather than redressing the violation of the defendant's rights, the exclusionary rule plays an entirely different role. As this Court's "foundational exclusionary rule case[s]" reflect, law-enforcement "abuses * * * gave rise to the exclusionary rule" as a judicial tool for "deter[ing] police misconduct." *Herring*, 129 S. Ct. at 702 (citation omitted). This Court established the rule as a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect" on law-enforcement officers. *Leon*, 468 U.S. at 906, 916 (quoting *Calandra*, 414 U.S. at 348); *Evans*, 514 U.S. at 10. And because the "exclusionary rule [i]s aimed at deterring police misconduct," *Krull*, 480 U.S. at 350, its driving purpose has always been "to

compel respect for the [Fourth Amendment's] constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).[2]

The exclusionary rule's "deterrent purpose" thus "necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Leon*, 468 U.S. at 919 (quoting *United States* v. *Peltier*, 422 U.S. 531, 539 (1975)). "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or their future counter-

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[2] The Court's early exclusionary-rule decisions originally "advanced two principal reasons" for the rule: (1) the need to "deter future unlawful police conduct" and (2) the "imperative of judicial integrity." *Powell*, 428 U.S. at 484 (citation omitted). Those cases suggested that the admission of unlawfully obtained evidence impaired "judicial integrity," because permitting such use would purportedly "'mak[e] the courts themselves accomplices'" in unlawful conduct. *Elkins*, 364 U.S. at 222-223 (citation omitted). The Court has since concluded, however, that judicial integrity has "limited force as a justification," *Leon*, 468 U.S. at 921 n.22 (quoting *Powell*, 428 U.S. at 485), because admitting evidence in court does not offend the Constitution, *id.* at 906, and the judiciary's suppression of incriminatory evidence itself risks "generat[ing] disrespect for the law and administration of justice," *id.* at 908 (citation omitted), by undermining "the truthfinding process" and "free[ing] the guilty." *Powell*, 428 U.S. at 490. It is now well settled that where "'law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law,'" "judicial integrity is 'not offended'" by the admission of the associated evidence. *Id.* at 485 n.23 (quoting *United States* v. *Peltier*, 422 U.S. 531, 538 (1975)). This Court has thus rejected the concept that, "even where deterrence does not justify" suppression, evidence may be suppressed to further judicial integrity. *Herring*, 129 S. Ct. at 700 n.2 ("Majestic or not, our cases reject this conception.").

parts, a greater degree of care toward the rights of an accused." *Ibid.* (quoting *Peltier*, 422 U.S. at 539).

The "exclusion of relevant incriminating evidence always entails" "grave" societal costs. *Hudson* v. *Michigan*, 547 U.S. 586, 595 (2006); see *Leon*, 468 U.S. at 907-908 (discussing costs); *Powell*, 428 U.S. at 489-491 (same). This Court therefore has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation" and has permitted suppression only as a "'last resort'" and "only where it 'results in appreciable deterrence.'" *Herring*, 129 S. Ct. at 700 (quoting *Hudson*, 547 U.S. at 591; *Leon*, 468 U.S. at 909); *Evans*, 514 U.S. at 11.

Not only must suppression deter misconduct, but "the benefits of deterrence must outweigh the costs." *Herring*, 129 S. Ct. at 700. Suppression is not justified by a "minimal advance in the deterrence of police misconduct" or by deterrent effects that are "speculative." *Calandra*, 414 U.S. at 351-352. Because suppression is an "extreme sanction" carrying "substantial social costs," the exclusionary "rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." *Herring*, 129 S. Ct. at 700-701 (quoting *Leon*, 468 U.S. at 916; *Krull*, 480 U.S. at 352; *Scott*, 524 U.S. at 364-365).

B. The Good-Faith Exception To The Exclusionary Rule Applies When Officers Engage In Objectively Reasonable Conduct

1. Originally, this Court's exclusionary-rule jurisprudence "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Hudson*, 547 U.S. at 591 (citation omitted). But

by 1984, the Court's "years of experience" with the exclusionary rule "forcefully suggest[ed]" that the rule should be "modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *Leon*, 468 U.S. at 909, 913 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring in the judgment)); see *id.* at 913 n.11 (noting that Members of this Court repeatedly had "urged reconsideration of the scope of the exclusionary rule"). This Court in *Leon* "reexamined the purposes of the exclusionary rule," concluded that the rule's "modification" was warranted, and accordingly modified the doctrine by creating the "good-faith exception to the Fourth Amendment exclusionary rule." *Id.* at 913, 926; see *id.* at 900, 909.

The Court reasoned that the "exclusionary rule is designed to deter police misconduct" but that, "where [an] officer's conduct is objectively reasonable," suppression "'will not further the ends of the exclusionary rule in any appreciable way.'" *Leon*, 468 U.S. at 916, 919-920 (quoting *Powell*, 428 U.S. at 539 (White, J., dissenting)). In that context, "the officer is acting as a reasonable officer would and *should act* in similar circumstances." *Id.* at 920 (citation omitted). Suppression therefore "can in no way affect his future conduct." *Ibid.* (citation omitted).

Leon concluded that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. The Court further explained that "evidence obtained from a search should be suppressed *only if* it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search

was unconstitutional under the Fourth Amendment." *Ibid.* (emphasis added) (quoting *Peltier*, 422 U.S. at 542). That objective "good-faith inquiry" turns on "the objectively ascertainable question whether a reasonably trained officer would have known that the search was illegal" and thereby "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* at 919 n.20, 922 n.23; see *Herring*, 129 S. Ct. at 703 (discussing this "objective" test).

Applying that analysis, the Court held that suppression is unjustified when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon*, 468 U.S. at 920. Even if a reviewing court later holds the warrant to be defective (and the resulting search unconstitutional) because the magistrate erred in his legal determination of probable cause, *id.* at 905, the Court in *Leon* held that an officer's "objectively reasonable" reliance on a magistrate's erroneous decision triggers the good-faith exception and precludes suppression. *Id.* at 922. The Court emphasized that "the exclusionary rule is designed to deter police misconduct, rather than to punish the errors of judges," and it expressly rejected the contention that the exclusionary rule should also focus (contrary to its historical origins) on the potential "behavioral effects on judges" of excluding evidence. *Id.* at 916; accord *Massachusetts* v. *Sheppard*, 468 U.S. 981, 990 (1984) (explaining, in *Leon*'s companion case, that "[t]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges" and holding that the good-faith exception applies where "it was the judge, not the police officers, who made the critical mistake") (citation omitted).

2. This Court has followed *Leon*'s principles in a series of decisions applying the good-faith exception to the exclusionary rule. In *Krull*, the Court held that the good-faith exception applies where police officers conduct a search in objectively reasonable reliance on a statute that purports to authorize such searches, even though the statute is later declared unconstitutional. 480 U.S. at 349-361. The Court emphasized that "the exclusionary rule [i]s aimed at deterring police misconduct" and that "legislators, like judicial officers, are not the focus of the rule." *Id.* at 350. Where an officer conducts a search in "objectively reasonable reliance on a statute," *Krull* reasoned, the subsequent suppression of evidence "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 349-350. Suppression, the Court reasoned, "will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350. The Court further explained that, even if it were appropriate to consider the "effect [of exclusion] on legislators," it found "no basis" for concluding that the "'extreme sanction of exclusion'" was warranted. *Id.* at 350-351 (citation omitted). Any incremental deterrent, the Court concluded, would be outweighed by the "substantial social costs exacted by the exclusionary rule." *Id.* at 352-353 (citation omitted).

The Court in *Evans* applied the same analysis where a police officer found evidence during the defendant's arrest based on reasonable reliance on an entry in a police computer system that erroneously indicated an outstanding warrant for the defendant's arrest. 514 U.S. at 3-4, 14-16. The Court assumed that "the erroneous information resulted from an error committed by an employee of the office of the Clerk of Court," *id.* at 4, and

applied the "*Leon* framework" to conclude that the good-faith exception applied. *Id.* at 14-16. The Court based that holding on two distinct grounds. "First, as [the Court] noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees." *Id.* at 14. For that reason, *Evans* held that the lower court's application of the exclusionary rule when "'the error rested with the justice court'" was "contrary to the reasoning of *Leon*." *Ibid.* (citation omitted). Second, and in any event, the Court found no inclination by court employees to subvert the Fourth Amendment and no basis for concluding that suppression would have any meaningful deterrent effect on such employees. *Id.* at 14-15.

Most recently, the Court in *Herring* held that the good-faith exception applied where the police obtained evidence incident to a defendant's arrest by an officer who reasonably relied on a police database that erroneously indicated an outstanding warrant for the defendant's arrest, when the error was the result of a "negligent bookkeeping" mistake by another police employee. 129 S. Ct. at 698, 701-704. The Court again emphasized that litigants urging application of the exclusionary rule must overcome a "high obstacle" by demonstrating that suppression would lead to "appreciable deterrence" that outweighs its substantial social costs. *Id.* at 700-701 & n.2 (citation omitted). The Court concluded that, although the "exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" by the police, *id.* at 702, an unlawful arrest based on the isolated negligence of a police employee was not "sufficiently deliberate that exclusion can meaningfully deter it" nor "sufficiently culpable that [any] such deterrence

is worth the price" that the justice system inevitably pays when evidence is suppressed. *Id.* at 702-703 & n.4.

C. The Good-Faith Exception Applies In This Case

Under these principles, the good-faith exception applies where, as here, officers conduct a search in objectively reasonable reliance on binding appellate precedent that, after the search, is overturned by this Court. Excluding evidence derived from the search could not produce appreciable deterrence of police misconduct: the officer who conducted the search acted as any objectively reasonable and well-trained officer would and should have acted in similar circumstances at the time. Accordingly, the enormous social costs of suppressing reliable evidence cannot be justified.

The Eleventh Circuit had long held that "[w]hen an occupant of an automobile is the subject of a lawful arrest, the Fourth Amendment permits the arresting officers to contemporaneously conduct a warrantless search * * * of the passenger compartment of the automobile, as well as any closed (or open) containers found in this area of the automobile." *United States* v. *Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996) (citation omitted). "Containers," the court explained, included "an automobile's glove compartment (whether locked or unlocked), as well as any containers found therein, such as the zipped leather bag" in which the police in *Gonzalez* had discovered a gun. *Id.* at 826. Accordingly, when Corporal Miller searched petitioner's car in April 2007, his actions were fully lawful under binding appellate precedent. He engaged in no culpable conduct whatsoever. *See Herring*, 129 S. Ct. at 701-703 (requiring culpable conduct greater than isolated negligence to justify suppression).

The Eleventh Circuit was but one amongst the "'legion'" of courts that had interpreted *Belton* "to allow a vehicle search incident to the arrest of a recent occupant even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona v. Gant*, 129 S. Ct. 1710, 1718 (2009) (citation omitted). That pre-*Gant* understanding of *Belton* "ha[d] been widely taught in police academies" for more than a quarter century and had guided law-enforcement officers "in conducting vehicle searches during [that period]." *Id.* at 1718, 1722; cf. 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c), at 517 & n.89 (4th ed. 2004) ("[U]nder *Belton* a search of the vehicle is allowed even after the defendant was removed from it, handcuffed, and placed in the squad car.") (collecting cases). Indeed, in *Gant*, five Members of this Court read *Belton* the same way as had the lower courts, interpreting it to adopt a bright-line rule permitting searches of the passenger compartment of an arrestee's car.[3]

Gant concluded that the lower courts' "widely accepted" understanding of *Belton* was incorrect. 129 S. Ct. at 1718-1719, 1722 n.11; see pp. 3-4, *supra*. But because Corporal Miller complied fully with Eleventh Circuit law, which reflected the then-prevailing under-

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[3] For Justice Scalia, "the rule set forth in * * * *Belton*" was "that arresting officers may always search an arrestee's vehicle in order to protect themselves from hidden weapons." *Gant*, 129 S. Ct. at 1724 (Scalia, J., concurring). Although he disagreed with Justice Stevens's reading of *Belton*, he joined Justice Stevens's opinion in order to provide the Court with a majority decision. *Id.* at 1725 (explaining that "a 4-to-1-to-4 opinion" would be "the greater evil"). The four dissenting Justices agreed with the bright-line reading of *Belton* and would have retained it. See *id.* at 1725 (Breyer, J., dissenting); *id.* at 1726-1727 (Alito, J., dissenting) (joined by the Chief Justice, Justice Kennedy, and, in pertinent part, Justice Breyer).

standing of the Fourth Amendment, be engaged in no misconduct that might be deterred through the "extreme sanction" of suppression. *Herring*, 129 S. Ct. at 700 (quoting *Leon*, 468 U.S. at 916). Before *Gant*, a well-trained officer in Corporal Miller's position would have had an objectively reasonable belief that a search of the car was lawful. Even petitioner "acknowledge[s] that [the] search was constitutional according to Eleventh Circuit precedent" at the time. Br. 3, 28. Corporal Miller's reliance on then-valid precedent therefore provides no occasion for deterrence. To the contrary, law-enforcement officers should be encouraged to follow governing precedents in performing their public functions and not to shade their decisions by anticipating that such precedents could be overruled.

Indeed, the good-faith exception's standard of objective reasonableness "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 U.S. at 920 n.20. And when applying the good-faith exception, this Court has repeatedly emphasized that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 129 S. Ct. at 701 (quoting *Krull*, 480 U.S. at 348-349). Those longstanding principles are firmly rooted in an officer's "reasonable" understanding of the law at the time, not on speculation about what the law might become if settled precedents are overturned. Officers who assiduously comply with binding appellate precedent articulating the boundaries of reasonable searches and seizures thus fall far short of the standard that this Court has demanded for suppression.

Officer Miller's objectively reasonable reliance on settled Eleventh Circuit law is functionally similar to an officer's objectively reasonable reliance on a statute that, after the relevant search, is declared unconstitutional. Because *Krull* held that objectively reasonable reliance on a statute later found unconstitutional triggers application of the good-faith exception, that exception would apply if a legislature enacted a statute authorizing its law-enforcement officers to conduct vehicle searches to the full extent allowed under the pre-*Gant* understanding of *Belton*. At least one State enacted such a statute and, although the statute was recently held unconstitutional in light of *Gant*, see *State* v. *Henning*, 209 P.3d 711 (Kan. 2009), the good-faith exception has been applied to evidence previously obtained from (unlawful) searches under the statute. See *State* v. *Daniel*, 242 P.3d 1186, 1191-1195 (Kan. 2010). Whether a court later holds a statute to be unconstitutional or whether it subsequently overturns settled appellate precedent, it is equally true that "excluding evidence obtained pursuant to [such invalidated authority] prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility" to comply with the law. *Krull*, 480 U.S. at 350. "Penalizing the officer for the [court's earlier] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

II. THE EXCLUSIONARY RULE IS DESIGNED TO DETER POLICE MISCONDUCT, NOT TO PROVIDE AN INCENTIVE FOR CRIMINAL DEFENDANTS TO CHALLENGE EXISTING FOURTH AMENDMENT PRECEDENTS

Petitioner contends (Br. 27-39) that the purpose of the exclusionary-rule remedy established by this Court is not only to deter police misconduct, but also to provide criminal defendants with an adequate "incentive to argue for a change in the law" that the police reasonably followed when they discovered the contested evidence. Br. 29, 32. Petitioner admits that his incentive-based theory "is not needed to ensure police compliance with existing law" because, when the police properly follow such law, "[t]here is no police 'error.'" Br. 30. Petitioner instead argues that a judge-made incentive is necessary more generally to "deter[] constitutional violations by making sure that the caselaw the police enforce accurately interprets the Fourth Amendment" and by giving this Court an "opportunity to make corrections" to existing law. Br. 29-30. Petitioner asserts (Br. 39-43) that "no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine," Br. 39, and contends (Br. 43-49) this Court's good-faith decisions in *Leon*, *Krull*, and *Herring* do not foreclose his incentive-based theory. Petitioner is incorrect.

A. The Exclusionary Rule Was Designed To Deter Only Police Misconduct, Not To Correct Errors By Courts

1. This Court developed the exclusionary rule in the early 20th Century as a direct response to "intentional" and "patently unconstitutional" abuses by federal law-enforcement officers and, in 1961, expanded the rule to the States after confronting "[e]qually flagrant conduct" by state officers. *Herring*, 129 S. Ct. at 702 (discussing

Weeks v. *United States*, 232 U.S. 383 (1914), and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The exclusionary rule therefore was "adopted to deter unlawful searches by police," *Sheppard*, 468 U.S. at 990 (citation omitted), and "was historically designed as a means of deterring police misconduct." *Evans*, 514 U.S. at 11, 14.

For that reason, this Court on at least three occasions has rejected attempts to expand the exclusionary rule's focus beyond police misconduct in order to address Fourth Amendment legal errors committed by actors in other branches of government. First, when *Leon* established the good-faith exception to the exclusionary rule, the Court expressly held that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." 468 U.S. at 916; see *id.* at 918 ("If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect * * * it *must* alter the behavior of individual law enforcement officers or the policies of their departments.") (emphasis added). Next, in *Krull*, the Court held that a legislature's error in enacting a statute later held to violate the Fourth Amendment did not undermine application of the good-faith exception when officers reasonably followed the statute because "legislators, like judicial officers, are not the focus of the rule." 480 U.S. at 350; *id.* at 348 (emphasizing that "the exclusionary rule was historically designed 'to deter police misconduct'") (citation omitted); see *Herring*, 129 S. Ct. at 701 (discussing *Krull*). And in *Evans*, the Court held that the lower court's suppression of evidence unlawfully obtained due to a court clerk's error was "contrary to the reasoning of *Leon*" because the exclusionary rule is "designed as a means of deter-

ring police misconduct, not mistakes by court employees." 514 U.S. at 14.

The Court in each of those decisions also explained that judicial and legislative officers were not inclined to ignore or subvert the Fourth Amendment and that nothing warranted the conclusion that suppression would have a "significant effect" in deterring such officials. *Evans*, 514 U.S. at 14-15; *Krull*, 480 U.S. at 350-351; *Leon*, 468 U.S. at 916-917. But those additional conclusions in no way diminish the Court's leading basis for rejecting an expansion of the exclusionary rule's function: the rule is and always has been designed only to deter police misconduct. See pp. 11-18, *supra*. Petitioner thus seeks to transform the exclusionary rule's purpose from the deterrence of police misconduct to the development of Fourth Amendment jurisprudence. That would be a major innovation in a judicially created doctrine that originated in the desire to prevent "flagrant" misconduct by the police. *Herring*, 129 S. Ct. at 702.

In proposing that officers operate at their peril in relying on binding precedent, petitioner ignores the very practical needs of law-enforcement officials who must discharge daily their important public functions and protect the citizenry. Police are encouraged to run training programs and institute policies based on constitutional law as pronounced by the courts. If police departments cannot reliably follow precedents that are binding at the time of a search, they can rely on no authoritative statement of their obligations under the Fourth Amendment. The result would be to place law enforcement at risk of jeopardizing prosecutions simply by following the law as the courts have interpreted it.

2. Petitioner cites little authority to support his reformulation of the exclusionary rule. He appears to rely principally on a single sentence in this Court's retroactivity decision in *Stovall* v. *Denno*, 388 U.S. 293 (1965), to support his contention that suppression "provides the incentive needed for defendants to challenge erroneous precedents." Br. 31-32, 35; see also, *e.g.*, Br. 11, 18, 37, 47.[4] But the sentence in *Stovall* on which petitioner relies is dictum and does not even address the Fourth Amendment exclusionary rule. *Stovall* rejected a federal habeas petitioner's argument that he should be granted habeas relief because of the then-new Sixth Amendment rule in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), requiring the presence of counsel at certain pre-trial confrontations for identification purposes. *Stovall* held that those decisions could be invoked only to exclude evidence from future identifications (unless the identification violated due process). 388 U.S. at 296-302.

Stovall then observed (in dicta) that Wade and Gilbert had the benefit of the rule in their cases because "[s]ound policies of decision-making" counseled against denying them that benefit. 388 U.S. at 301. The Court noted that those policies were rooted, *inter alia*, in "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law." *Ibid.* That "possible effect" is a slender reed on which to reformulate the longstanding purpose of the exclusionary rule.

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[4] Petitioner attempts to bolster his case by asserting that "*Leon* approvingly cites *Stovall*," Br. 47, but *Leon* invoked *Stovall* only to explain that the Court's retroactivity decisions at the time utilized a three-factor test that considered the purpose of the new constitutional rule being considered for retroactive effect, not for the dicta on which petitioner relies. See *Leon*, 468 U.S. at 912 n.10.

and it cannot overcome this Court's more recent description of the rule in *Leon* and in other good-faith cases. That is particularly true because the Court's approach to retroactivity underwent a seismic shift in the nearly half century since *Stovall*, see pp. 43-44, 48-49, *infra*, and the Court's modern retroactivity decisions never repeated *Stovall*'s reference to providing "incentive[s]" to litigants as a justification for applying a new rule to certain defendants.

Petitioner attempts to find support in the discussion in *Krull* and *Leon* of "incentives to challenge police action." Br. 37. But as discussed *infra* (at pp. 28-29), those decisions did so only in rejecting arguments similar to the one petitioner advances. See *Krull*, 480 U.S. at 354, 355 n.11; *Leon*, 468 U.S. at 924 & n.25. The Court's rejection of contentions pressed by litigants does not suggest that the Fourth Amendment's exclusionary rule is designed to provide incentives to challenge existing precedent.

In the face of this Court's repeated explanation that the exclusionary rule is designed only to "deter" police misconduct, petitioner acknowledges that it "may seem counterintuitive to speak of incentives in criminal litigation as matters of 'deterrence'" addressed by the exclusionary rule. Br. 38. That linguistic disconnect underscores that this Court's exclusionary-rule decisions do not support petitioner's incentive-based theory, and it confirms that the exclusionary rule's exclusive focus is the deterrence of police misconduct.

B. Applying The Good-Faith Exception In This Case Will Not Stymie The Development Of Fourth Amendment Jurisprudence

Assuming *arguendo* that providing an additional "incentive" to criminal defendants to challenge appellate precedents can qualify as a type of "deterrence" fostered by the exclusionary rule, any marginal benefits that might result from that incentive are speculative and, at best, minimal. They do not rise to the level of "appreciable deterrence" necessary to justify suppression. *Herring*, 129 S. Ct. at 700 (citation omitted).

Petitioner contends (Br. 39-43) that the exclusionary rule should be applied where officers have conducted a search in objectively reasonable reliance on binding appellate precedent "because no other remedy creates an incentive to argue for corrections in Fourth Amendment doctrine." Br. 39. That assertion rests on two flawed premises. First, although the good-faith exception in this context may diminish the incentive for certain criminal defendants to bring suppression challenges when officers follow binding appellate precedent, defendants will nevertheless retain an adequate incentive to bring meritorious challenges to unlawful searches and seizures. Second, civil damage actions provide an ample means for litigants to challenge recurring categories of law-enforcement searches and seizures. Combined, criminal and civil cases will enable this Court to correct any recurring errors of significance concerning the lawfulness of searches and seizures under the Fourth Amendment. Denying the good-faith exception in this context to create additional incentives is unnecessary.

1. In the criminal context, no sound reason justifies concluding that defendants will lack the incentive to bring meritorious challenges to police searches or sei-

zures, or that appellate decisions upholding such practices will evade this Court's review, if the good-faith exception is applied to searches and seizures made in objectively reasonable reliance on appellate precedent.

a. This Court rejected similar incentive-based arguments in *Leon* and *Krull*.[5] Although "insubstantial suppression motions" may well be curtailed in some contexts where officers act in objectively reasonable reliance on settled appellate precedent, it is doubtful that many defendants would "lose their incentive to litigate meritorious Fourth Amendment claims." *Leon*, 468 U.S. at 924 n.25. "[T]he magnitude of the benefit conferred on defendants by a successful [suppression] motion" itself "makes it unlikely that litigation of colorable claims will be substantially diminished." *Ibid.*; accord *Krull*, 480 U.S. at 353-354. The defendant's cost of pursuing suppression "would be small" and the upside in many cases "enormous": the suppression of key evidence amounting to a "get-out-of-jail-free card." *Hudson*, 547 U.S. at 595.

Just as defendants have "no reason not to argue that a police officer's reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith," *Krull*, 480 U.S. at 354; see *id.* at 355 n.11, they similarly have every reason to

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[5] The defendant in *Leon* argued that a "good faith exception would effectively eliminate any incentive to challenge dubious police practices in court" and that defendants would be unlikely to press arguments that would ultimately "have no bearing on the outcome of their cases." Leon Br. at 28, *Leon*, *supra* (No. 82-1771). In *Krull*, the defendant asserted that "defendants will choose not to contest the validity of statutes if they are unable to benefit directly by the subsequent exclusion of evidence, thereby resulting in statutes that evade constitutional review." 480 U.S. at 353.

argue that existing precedent is unsound and that reliance on it is unreasonable. At a minimum, defendants can argue that a flawed existing precedent should be limited to its facts and that no officer could rely in good faith on that precedent as extended to the factual variation before the court. Defense counsel are exceptionally creative in distinguishing their client's cases from those resolved by prior decisions involving different searches and seizures. And the unique incentives of defendants to challenge the government's case, through state-provided counsel if the defendant is indigent, ensure that arguable defects in the law will be vigorously urged. If a court believes that the defendant's arguments have exposed a flaw in existing Fourth Amendment precedent, even if a good-faith exception applies, "nothing will prevent [the] court[] from deciding that question"—or suggesting that it warrants further review—"[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers." *Leon*, 468 U.S. at 924.

b. The nature of Fourth Amendment jurisprudence encourages advocacy seeking to navigate around existing precedent, thereby leaving defendants ample incentive to argue that an officer's conduct was objectively unreasonable. The Fourth Amendment's "touchstone * * * is reasonableness," *United States* v. *Knights*, 534 U.S. 112, 118 (2001), which must be assessed under the "totality of the circumstances" in each case. *Samson* v. *California*, 547 U.S. 843, 848 (2006) (citation omitted). Even well-known principles like "probable cause" and "reasonable suspicion" are "fluid concepts" that are "'not readily, or even usefully, reduced to a neat set of legal rules'" because they "take their substantive content from the particular contexts" in which they apply.

Ornelas v. *United States*, 517 U.S. 690, 695-696 (1996) (citation omitted). Defense counsel can therefore be expected to exploit the fact-specific nature of much Fourth Amendment jurisprudence to argue in favor of suppression even when existing precedent stands in the way. As petitioner himself explains, "[b]ecause Fourth Amendment law is intensely fact-specific, every search or seizure will be different." Br. 41.

Experience with the good-faith exception confirms as much. Under petitioner's logic, the creation of the good-faith exception in *Leon* should have eliminated the incentive for defendants to challenge searches conducted pursuant to facially valid warrants: the good-faith exception should have halted the development of Fourth Amendment law on questions such as whether a warrant particularly described the place to be searched or person or thing to be seized and whether a warrant is supported by probable cause. But the last 25 years have not demonstrated a dearth of Fourth Amendment challenges. To the contrary, criminal defendants, undaunted, have continued to seek the suppression of evidence from searches under facially valid warrants, and courts have continued to analyze the constitutionality of such warrants, even when they ultimately *deny* suppression pursuant to the good-faith exception. Courts, for instance, continue to determine whether warrants describe "the place to be searched," *Leon*, 468 U.S. at 923, with sufficient particularity to satisfy the Fourth Amendment. See, *e.g.*, *United States* v. *Rosa*, 626 F.3d 56, 62-66 (2d Cir. 2010); *United States* v. *Tracey*, 597 F.3d 140, 146-154 (3d Cir. 2010); *United States* v. *Otero*, 563 F.3d 1127, 1131-1133 (10th Cir.), cert. denied, 130 S. Ct. 330 (2009); *United States* v. *Riccardi*, 405 F.3d 852, 860-864 (10th Cir.), cert. denied, 546 U.S. 919

(2005); *United States* v. *Bridges*, 344 F.3d 1010, 1016-1019 (9th Cir. 2003); *United States* v. *Thomas*, 263 F.3d 805, 807-808 (8th Cir. 2001), cert. denied, 534 U.S. 1146 (2002); see also *United States* v. *Clark*, 31 F.3d 831, 835 (9th Cir. 1994) (warrant not supported by probable cause), cert. denied, 513 U.S. 1119 (1995).

The same is true of cases covered by *Krull*. Because of the huge incentive to suppress evidence, defendants continue to challenge the constitutionality of statutes, and courts occasionally agree with their challenges, even when ultimately admitting the evidence under the good-faith exception. For example, in *United States* v. *Warshak*, No. 08-3997, 2010 WL 5071766, at *9-*14 (6th Cir. Dec. 14, 2010), the court held that 18 U.S.C. 2703's authorization for the government to obtain email from a commercial service provider without first obtaining a warrant based on probable cause violated the Fourth Amendment. But the Court upheld the admission of evidence under *Krull*. *Id.* at *14 ("Naturally, Warshak argues that the provisions of the [law] at issue in this case were plainly unconstitutional. * * * [W]e disagree."). Other cases that reject suppression nonetheless attest to the persistence of Fourth Amendment challenges to statutes, notwithstanding *Krull*. See *e.g.*, *United States* v. *Steed*, 548 F.3d 961, 969 (11th Cir. 2008) (applying *Krull* without deciding Fourth Amendment issue); *United States* v. *Vanness*, 342 F.3d 1093, 1097 (10th Cir. 2003) (same); *United States* v. *Branson*, 21 F.3d 113, 114-115 & n.1 (6th Cir. 1994) (upholding state warrantless-inspection statute as constitutional without applying *Krull*; reversing district court, which had rejected good-faith exception). The good-faith exception thus has not precluded the development of Fourth Amendment law, including on new issues.

c. The likelihood that meaningful police practices would escape this Court's review is further diminished by the multiplicity of jurisdictions in which criminal defendants may challenge those practices: 12 federal courts of appeals, 50 States, and the District of Columbia. Even if some of those jurisdictions have upheld the constitutionality of particular types of searches or seizures, it is unlikely that all 63 jurisdictions will have done so. And in those jurisdictions in which the question remains open, defendants have an undiminished incentive to raise the issue. When litigants can make reasonable arguments on both sides of a Fourth Amendment issue, the normal result is a patchwork of decisions reaching varying results. Such conflicts regularly result in this Court's review. At that point, the Court can correct any Fourth Amendment errors.[6]

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[6] Even when this Court has resolved a particular issue, thereby curtailing the development of conflicts in the lower courts, defendants will still have strong incentives to frame their arguments to distinguish this Court's precedent, while simultaneously making clear their disagreement with it and arguing that officers acted objectively unreasonably in straying beyond it. This Court may then take the opportunity to squarely resolve the validity of its precedent. Cf. *Batson* v. *Kentucky*, 476 U.S. 79, 84 n.4, 100 n.25 (1986) (noting that the petitioner raised a Sixth Amendment objection to race-motivated peremptory challenges "in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents"; holding nevertheless that the case turned on equal-protection principles and partially overruling *Swain* v. *Alabama*, 380 U.S. 202 (1965)). While a good-faith rule for reliance on appellate precedent might mean that direct challenges to a Fourth Amendment decision of this Court could not result in suppression of evidence even if this Court overruled the decision, that singular situation does not justify the costs of suppression in change-of-appellate-law cases generally under the logic of this Court's good-faith holdings.

d. Petitioner contends (Br. 22-27) that if the Court adopted a good-faith exception for objectively reasonable reliance on appellate precedent, this Court would thereafter lack Article III jurisdiction to review challenges to existing Fourth Amendment doctrine. That is incorrect. Petitioner first asserts (Br. 23-25) that a good-faith rule would permit "new Fourth Amendment decisions to be applied only prospectively," thus amounting to "a regime of rule-creation by advisory opinion." Br. 23, 25. But *Leon* itself rejected the contention that "application of a good-faith exception" would "preclude review of the constitutionality of the search or seizure," explaining that federal courts may decide whether the Fourth Amendment was violated "before turning to the good-faith issue" and "undoubtedly" have Article III authority to resolve such questions concerning the "suppression of the fruits of allegedly unconstitutional searches or seizures." 468 U.S. at 924-925. The Fourth Amendment rule would apply to the parties, even if the exclusionary-rule remedy would not result. This is no different for Article III purposes from the correction of Fourth Amendment errors when defendants may receive no relief because any error might be found harmless. See, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 40 (2001); *Wilson* v. *Arkansas*, 514 U.S. 927, 937 n.4 (1995).

Petitioner also contends (Br. 25-27) that the proposed good-faith rule would remove Article III "standing" to appeal. Assuming *arguendo* that "standing" concepts apply to a criminal defendant seeking to appeal her conviction, petitioner's argument confuses the requirements of standing with the merits of appellate issues. See *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 624 (1989) (standing "in no way depends on the merits of the claim") (citation and brackets omitted). A defendant

challenging the admission of evidence virtually always would meet "standing" requirements: the conviction is a concrete injury, assertedly traceable to the challenged evidence, and redressable if the appellate court reverses. *See Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998); cf. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (standing doctrine's redressibility requirement merely demands a showing that "the requested relief" would likely redress an injury in fact); *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). A defendant is no more deprived of "standing" by a potential good-faith obstacle to relief (which the defendant is free to contest) than the defendant would be deprived of standing because the admission of challenged evidence would be found harmless error.

In short, as this Court explained when it created the good-faith exception for warrant-authorized searches, an exception from suppression for objectively reasonable reliance on settled precedent should neither "preclude review of the constitutionality of the search[es] or seizure[es]" nor "freeze Fourth Amendment law in its present state." *Leon*, 468 U.S. at 924.

2. The availability of civil actions in which plaintiffs may challenge searches and seizures confirms that conclusion. For example, a plaintiff may bring a damages action against a municipality under 42 U.S.C. 1983 for a violation of the plaintiff's federal rights by an officer who acted pursuant to a "policy," "custom," "usage," or "practice" of the municipality. *Los Angeles County* v. *Humphries*, 131 S. Ct. 447, 452 (2010) (citing *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690-691 (1978)). A municipality that has affirmatively taught its officers to conduct law-enforcement searches in a manner that violates the Fourth Amendment will therefore be sub-

ject to Section 1983 liability for resulting violations. See, *e.g.*, *Hartline* v. *Gallo*, 546 F.3d 95, 103-104 (2d Cir. 2008). In such cases, the municipality is liable because it has effectively "direct[ed] an employee" to take conduct that violates federal law. See *Board of the County Comm'rs* v. *Brown*, 520 U.S. 397, 404-405 (1997). Indeed, even an unwritten but "widespread practice" can constitute a municipal "custom" or "usage" if it is sufficiently permanent and well settled. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion).

In such suits, municipalities cannot claim qualified immunity based on the good faith of the officers involved. *Owen* v. *City of Independence*, 445 U.S. 622, 638, 650-652 (1980), and no other significant barrier would prevent the courts from resolving whether a search or seizure conducted as part of a municipal practice violates the Fourth Amendment. Indeed, the availability of attorney's fees under 42 U.S.C. 1988(b) provides ample incentive for such challenges. See *Hudson*, 547 U.S. at 597-598 (rejecting view that Section 1983 actions against municipalities are an ineffective means of challenging Fourth Amendment violations).

Even where a widespread police practice has been upheld in certain appellate jurisdictions, plaintiffs armed with meritorious claims in those jurisdictions could seek this Court's review of any resulting adverse judgment. And plaintiffs in appellate jurisdictions that had yet to resolve the Fourth Amendment question could pursue such claims below, and, if unsuccessful, seek this Court's review. Ultimately, if the Fourth Amendment claim has merit, civil plaintiffs will present it to this Court. This method of resolving allegations of Fourth Amendment violations is highly preferable in at least one significant respect: it allows plaintiffs entirely

innocent of criminal activity to enforce their rights and develop Fourth Amendment jurisprudence.

Local law-enforcement officers conduct a substantial number of the searches and seizures nationwide, including those later challenged in federal prosecutions like this case. Although petitioner apparently fears that significant law-enforcement practices will evade judicial scrutiny, municipalities have powerful incentives to teach search and-seizure rules to their officers because the "[f]ailure to teach and enforce constitutional requirements [to police officers] exposes municipalities to financial liability" under Section 1983. *Hudson*, 547 U.S. at 599. The very existence of appellate precedents upholding any such practices, moreover, makes it much more, not less, likely that those judicially approved practices will be taught to local law-enforcement officers in a manner subject to review in Section 1983 actions. Cf. *ibid.* (noting "increasing evidence that police forces across the United States take the constitutional rights of citizens seriously"); *Gant*, 129 S. Ct. at 1722 (observing that "it appears that the State's reading of *Belton* has been widely taught in police academies").

Petitioner asserts (Br. 42) that Section 1983 plaintiffs must establish "deliberate indifference" to impose municipal liability. That is incorrect. Deliberate indifference must be established in so-called "failure-to-train cases" in which liability is premised on a municipality's "decision *not* to train" its employees about certain matters. *Brown*, 520 U.S. at 409 (discussing *City of Canton* v. *Harris*, 489 U.S. 378 (1989)) (emphasis added). Such cases require "rigorous standards of culpability" because they involve a "facially lawful municipal action" regarding the extent of appropriate training that (indirectly) causes an undertrained employee to violate fed-

eral rights. *Id.* at 405, 407. But where a municipality has itself "directly inflicted an injury" through its *affirmative* instructions to employees, no additional culpability is needed because the municipality is itself "the moving force behind the injury." See *id.* at 405.

C. Even If Petitioner's Incentive-Based Understanding Of The Exclusionary Rule Were Correct And Resulted In Appreciable Deterrence, The High Costs Of Exclusion Would Outweigh Any Likely Benefits

Even assuming *arguendo* that (1) providing an "incentive" for criminal defendants to challenge prevailing precedents may properly be deemed to advance the exclusionary rule's "deterrent" function and (2) an "appreciable" deterrence would result from denying the good-faith exception where officers reasonably rely on binding appellate precedent, any such "deterrent" effect would be outweighed by the substantial societal costs associated with petitioner's rule. Because petitioner fails to demonstrate that any such deterrence "outweigh[s] the costs," he fails to clear the "'high obstacle'" that those urging exclusion must overcome. *Herring*, 129 S. Ct. at 700- 701 (citation omitted).

1. The societal costs imposed by the courts' suppression of evidence obtained in objectively reasonable reliance on binding appellate precedent are grave.

First, the "ultimate question of guilt or innocence * * * should be the central concern in a criminal proceeding." *Powell*, 428 U.S. at 490; see *United States* v. *Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."). A criminal defendant's request that a court suppress evidence from a search that violated the Fourth Amendment is therefore "crucially different"

from claims based on violations of "many other constitutional rights." Although the "means" by which the evidence was obtained may have been unlawful, the evidence itself ordinarily has been "in no way * * * rendered untrustworthy." *Powell*, 428 U.S. at 490 (citation omitted). In fact, such evidence is both "typically reliable and often the most probative evidence bearing on guilt or innocence." *Ibid.* The judiciary's decision to remove such reliable proof from consideration by a jury fundamentally undermines "the truthfinding process," "often frees the guilty," *ibid.*, and risks sending "possibly dangerous defendants" back into society. *Herring*, 129 S. Ct. at 701; see *Hudson*, 547 U.S. at 595. The "magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system" where, as here, "law enforcement officers have acted in objective good faith." *Leon*, 468 U.S. at 908.

Second, suppression of evidence, and freeing the guilty, when officers have simply followed the lead of appellate courts risks "generat[ing] disrespect for the law and administration of justice." *Leon*, 468 U.S. at 908 (citation omitted). "[T]he exclusionary rule is not an individual right." *Herring*, 129 S. Ct. at 700; accord *Leon*, 468 U.S. at 906. It is a "judicially created remedy," *ibid.* (citation omitted), that is "prudential rather than constitutionally mandated," *Scott*, 524 U.S. at 363. Reflecting its prudential character, the exclusionary rule has been tailored in modern jurisprudence, including the good-faith-exception decisions, to avoid the rule's application where it would undermine commonsense notions of justice. It would be extraordinarily difficult for the courts to justify—as a prudential rule—the "extreme sanction of exclusion," *Leon*, 468 U.S. at 916, when officers relied in objective good faith on then-gov-

erning precedents issued by the courts themselves. Unlike reversals for most trial errors—which frequently involve an opportunity to correct any error on retrial—the exclusion of evidence obtained before trial irrevocably removes highly probative proof of guilt from the judicial process.

Third, denying law-enforcement officers the ability to safely conduct their public duties though the objectively reasonable reliance on binding appellate precedent significantly risks deterring police conduct that is critical to the public interest. Even if petitioner's rule would marginally increase the Court's ability to overturn incorrect Fourth Amendment precedent from the lower courts, such changes in the law would be relatively rare especially compared to the total body of appellate Fourth Amendment jurisprudence governing police conduct. But officers in the field must make real-world judgments well in advance of any potential change in governing precedent. If their objectively reasonable reliance on existing precedents cannot save evidence of crime from suppression, officers will be inclined to operate well within the boundaries of constitutional searches and seizures. *See Gates*, 462 U.S. at 258 (White, J., concurring in the judgment) ("It would be surprising if the suppression of evidence garnered in good faith, but by means later found to violate the Fourth Amendment, did not deter legitimate * * * police activities" and "hinder[] the solution and even the prevention of crime.").

Such excessive self-restraint is undesirable. The Fourth Amendment's touchstone of reasonableness strikes the appropriate balance "needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-119 (citation omitted)). The public, for instance, has a strong interest in police acting promptly as

soon as they perceive exigent circumstances that justify a search under then-current law. If police delay their response because of doubt about whether the line suggested by then-governing precedent may later be redrawn, the public suffers. The public likewise has a significant interest in officers exercising their ability to conduct brief, investigatory stops when they have a reasonable, articulable suspicion that a crime has occurred or is afoot. Passing up some of those opportunities permitted under governing precedent in order to hedge against unknown future jurisprudential changes will injure the public interest. Cf. *Hudson*, 547 U.S. at 595 (explaining that because the precise requirements of the Court's knock-and-announce jurisprudence is "necessarily uncertain," the "massive" consequences of suppression for knock-and-announce violations would lead officers "to wait longer than the law requires" and "produc[e] preventable violence against officers in some cases, and the destruction of evidence in many others").

2. Petitioner contends (Br. 49-60) that the "costs of the exclusionary rule when courts overturn Fourth Amendment precedents are modest" and are outweighed by the benefit of encouraging defendants to challenge existing appellate precedent. Br. 49-50. In some cases, he argues (Br. 51-53), the searches conducted in reliance on such precedents will be deemed constitutional under a new constitutional test. And in the other cases in which unconstitutionally obtained evidence was admitted, convictions may sometimes be preserved under other doctrines. Br. 53-58. Petitioner significantly underestimates the costs of suppression, his prediction of "modest" costs is speculative, and any claimed benefits are exceedingly limited. In the end, foregoing the good-

faith exception imposes substantial costs wholly unjustified by petitioner's incentive theory.

First, petitioner ignores the significant costs of deterring *lawful* police activity and of engendering disrespect for the law and administration of justice. See pp. 38-40, *supra*.

Second, it is difficult to estimate how often other legal doctrines might salvage cases where police obtained evidence from searches conducted in objectively reasonable reliance on then-binding precedent that is later overturned. For instance, the harmless-error doctrine (Br. 58) is often unavailable for entire categories of drug- and gun-possession charges (like the charge in this case) because suppression usually targets the key evidence. Moreover, to the extent that petitioner uses a handful of reported decisions to suggest (Br. 53-55) that a meaningful portion of the evidence obtained from pre-*Gant* vehicle searches made incident to an arrest (which are now invalid under *Gant*) may still be used in prosecutions, petitioner presents an incomplete picture. It is likely that many prosecutions with more significant *Gant* problems were simply abandoned or never filed. Prosecutors have limited resources and must exercise discretion in deciding what cases will be pursued. A review of reported decisions therefore cannot capture the full impact that *Gant* has had on prosecutions nationwide. This Court, perhaps for similar reasons, has not judged the appropriateness of good-faith exception based on the fraction of cases that will require reversal. It has instead emphasized that the relevant cost is that "some guilty defendants will go free." See *Leon*, 468 U.S. at 907.

This Court has repeatedly emphasized that, "[a]s with any remedial device, the application of the [exclu-

sionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Leon*, 468 U.S. at 908 (quoting *Calandra*, 414 U.S. at 348); see also, *e.g.*, *Hudson*, 547 U.S. at 591; *Scott*, 524 U.S. at 363; *Evans*, 514 U.S. at 11. The suppression of evidence obtained by officers in objectively reasonable reliance on binding precedent authorizing the search would serve little or no additional deterrent effect and would impose substantial social costs. The court of appeals correctly applied the good-faith exception in this case.

III. THIS COURT'S RETROACTIVITY JURISPRUDENCE DOES NOT ADDRESS THE PROPER SCOPE OF THE GOOD-FAITH EXCEPTION

Rather than relying on this Court's doctrine in *Leon*, *Krull*, and *Herring* to determine whether the good-faith exception applies in this context, petitioner contends (Br. 10-22) that this Court's retroactivity jurisprudence governs the application of the Fourth Amendment exclusionary rule. He argues that "[t]he exclusionary rule is available in all cases not yet final on the date" that a new Fourth Amendment principle is announced because such "[n]ew decisions are retroactive." Br. 13. Petitioner's use of retroactivity principles to dictate the application of the exclusionary rule confuses two currently distinct, but historically related, doctrines.

In the criminal context, "retroactivity" addresses whether a criminal defendant is eligible to *seek* relief in his case for past constitutional violations under a newly announced constitutional rule of criminal procedure. The Court's retroactivity jurisprudence determines in which proceedings the new rule may be invoked: under current doctrine, it may be invoked on direct review, and

it generally may not be invoked on federal collateral attack. The exclusionary rule, in contrast, is a potential form of relief for Fourth Amendment violations that a defendant may assert in certain contexts.

Contemporary jurisprudence grounds retroactivity doctrine in the nature of the judicial process, the equitable treatment of litigants, and principles of finality. By contrast, the determination of whether the exclusionary rule is available turns on whether its deterrent purposes will be sufficiently advanced to justify its costs. Petitioner cannot rely on modern retroactivity principles to avoid this Court's separate analysis of exclusionary-rule policy. Nor is petitioner correct in suggesting (Br. 20-22) that applying the good-faith exception when an officer relies on binding appellate precedent that is later overturned would revive now-discredited retroactivity law. Rather, it would simply apply considerations that were previously relevant to retroactivity law, but that are now captured in the good-faith doctrine of *Leon*, *Krull*, and *Herring*. Those are the relevant precedents, and petitioner's effort (Br. 43-49) to limit those cases to enforcement of "existing precedents" is unsound.

A. Retroactivity Jurisprudence Addresses Whether A Defendant May Seek Relief For Violations Of Newly Announced Rights, Not Whether The Defendant Is Entitled To Relief

In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), this Court considered whether its then-recent equal-protection decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), should apply retroactively to cases on direct appeal. The Court explained that, under its former retroactivity doctrine originating in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the retroactivity of a new constitutional rule

of criminal procedure turned on the Court's consideration of three factors: the "purpose" served by the new constitutional standard; the "reliance" placed on the old constitutional standard by law-enforcement authorities; and the effect that retroactive application of the new standard would have on "the administration of justice." 479 U.S. at 320-321 (quoting *Linkletter*, 381 U.S. at 636). *Griffith* scrapped that analysis in favor of a new, uniform standard: A "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception." *Id.* at 326, 328.

Two considerations explained the Court's reformulation of retroactivity jurisprudence for criminal cases on direct review. First, this Court, unlike a legislature, does "not promulgate new rules of constitutional criminal procedure on a broad basis"; rather, in accordance with the "nature of judicial review," it expounds the law by "adjudicat[ing]" a specific case. *Griffith*, 479 U.S. at 322. But having announced that rule, the court explained, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 323. Second, the selective application of new rules based on the happenstance of which case was selected for their announcement "violates the principle of treating similarly situated defendants the same." *Ibid.*

Under *Griffith*, a criminal defendant whose case is pending on direct review will be eligible to *seek relief* for the government's earlier violation of a constitutional rule of criminal procedure. But retroactivity does not speak to the *remedy* (if any) that is appropriate for such a violation. As petitioner explains, *Powell* v. *Nevada*, 511 U.S. 79 (1994), "is a helpful example." Br. 13-14. In

Powell v. *Nevada*, the Court held that because Powell's conviction was not final when the Court announced its decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), Powell was "entitle[d] * * * to rely on *McLaughlin*['s]" holding, namely, that the Fourth Amendment requires a judicial determination of probable cause within 48 hours of a warrantless arrest (absent extraordinary circumstances). 511 U.S. at 84. The Court emphasized that "[i]t does not necessarily follow, however, that Powell must 'be set free' or gain other relief" because, *inter alia*, the "appropriate remedy for [an unconstitutional] delay in determining probable cause (an issue not resolved by *McLaughlin*)" had yet to be determined. *Ibid.* (citation omitted).

Powell illustrates that a criminal defendant's ability to *rely* on a new rule does not automatically translate into a right to *relief* under the new rule. That principle explains why *Griffin*'s retroactivity holding does not assist petitioner in arguing for suppression as a remedy in this case: "Whether the exclusionary sanction is appropriately imposed in a particular case * * * is 'an issue *separate* from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *Leon*, 468 U.S. at 906 (emphasis added; citation omitted); accord *Herring*, 129 S. Ct. at 700; *Hudson*, 547 U.S. at 591-592. *Griffith* establishes that a new rule applies on direct review; it does not speak to whether a court must provide any particular relief, such as exclusion of evidence.[7]

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[7] Petitioner's erroneous understanding of the relationship between retroactivity and the exclusionary rule also extends to his description of the rules that apply when a conviction is final and challenged on collateral review. Petitioner asserts (Br. 15) that under *Stone* v. *Powell*, 428 U.S. 465 (1976), "[t]he suppression remedy for Fourth Amendment

Petitioner suggests (Br. 17) that *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), indicates that "retroactivity is about remedies, not rights." *Danforth* does not assist petitioner's argument. That decision held that the Court's retroactivity rule announced in *Teague* v. *Lane*, 489 U.S. 288 (1989), under which new rules of criminal procedure generally cannot provide the basis for collateral relief in federal habeas-corpus proceedings, does not prevent state courts from providing collateral relief in their own courts for such new rules. 552 U.S. at 266. In the passage on which petitioner relies, *Danforth* stated that the Court's retroactivity jurisprudence determined, "not the temporal scope of a newly announced right," but whether a previous violation "will entitle a criminal defendant to the relief sought." *Id.* at 271; see *id.* at 271 n.5 (noting that "redressability" would have been a more accurate term than "retroactivity"). But the Court did not imply, let alone hold, that in every proceeding in which retroactivity jurisprudence permits a

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violations is not available in habeas or other collateral review proceedings." While petitioner is correct that *Stone* generally precludes application of the exclusionary rule in habeas proceedings, *Stone* is not a retroactivity decision. Rather, it is an exclusionary-rule decision in which the Court balanced incremental deterrence against costs. *Id.* at 489. The distinction is illustrated by the one avenue that *Stone* preserved for exclusionary-rule claims raised on habeas: cases in which the defendant was not "provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Id.* at 494. When the State denies the defendant that opportunity, the defendant may invoke the exclusionary rule on habeas. *Id.* at 494 n.37. In that situation, the principle that prevents the defendant from invoking "new" Fourth Amendment rules, announced since his case became final, derives from this Court's retroactivity jurisprudence in *Teague* v. *Lane*, 489 U.S. 288 (1989). Thus, on collateral review as well as on direct review, this Court's retroactivity jurisprudence is distinct from its exclusionary-rule jurisprudence.

new rule to be asserted, a violation must be remedied by the reversal of a conviction. When read in context, *Danforth* made two points: First, this Court's *announcement* of the right does not mean that the right did not previously exist; rather, "the underlying right necessarily pre-exists our articulation of the new rule." *Ibid.* Second, retroactivity concerns whether a criminal defendant is *eligible to seek relief* based on the government's violation of a new rule. Retroactivity thus concerns "the availability or nonavailability of remedies." *Id.* at 291.

Danforth could not have meant that a rule's retroactivity mandates relief, notwithstanding all other remedial doctrines. If a court finds a constitutional violation, it does not mean (with limited exceptions for preserved claims of structural error) that the defendant is "entitle[d]" to any relief, as petitioner acknowledges. See Br. 50. Even on direct review, the error may be harmless and, if not timely raised below, may not qualify as reversible plain error. Br. 57-58. Similarly, as petitioner admits (Br. 53-54), even when the exclusionary rule is generally available, a defendant is not entitled to relief for an unconstitutional search where the evidence would have been inevitably discovered by the government. Those rules, like the good-faith exception, may bar relief even when a defendant may rely on a new rule to establish a violation. *Danforth* cannot have meant to displace those basic rules.

Equally unfounded is petitioner's contention (Br. 12-13) that the Court's disposition in *Gant* means that the exclusionary rule must be available in the case that announces the new Fourth Amendment rule and that retroactivity jurisprudence then requires application of the exclusionary rule to all other cases on direct review.

The Court had no occasion to address any exclusionary-rule issue in *Gant* because the question presented there addressed only the underlying Fourth Amendment issue governing the constitutionality of the vehicle search. See Pet. at i, *Gant*, *supra* (No. 07-542). The State's briefs on the merits thus focused entirely on that constitutional question, and it did not suggest, much less argue as an alternative, that the good-faith exception would warrant reversal. See Pet. Br. at 15-44, *Gant*, *supra*; Reply Br. at 1-30, *Gant*, *supra*. Unsurprisingly, in the absence of briefing on the point, the Court in *Gant* did not address the good-faith exception or any other remedial issue.

B. Application Of The Good-Faith Exception Here Would Not Return To Now-Superseded Retroactivity Decisions

1. Petitioner argues (Br. 20-21) that the court of appeals' rule simply applies "a modified version of the discredited *Linkletter* retroactivity test" and revives an argument that this Court rejected in *United States* v. *Johnson*, 457 U.S. 537 (1982). Petitioner is incorrect.

Under the retroactivity doctrine pioneered in *Linkletter*, the Court evaluated, among other considerations, the "purpose to be served by the new constitutional rule" in order to decide whether to give it retroactive effect. See *Desist* v. *United States*, 394 U.S. 244, 248-249 (1969); *Stovall*, 388 U.S. at 297; *Linkletter*, 381 U.S. at 629. Thus, decisions under the prior doctrine that considered the "retroactivity problem in the context of the exclusionary rule" took into account the purpose and effect of suppression in deciding whether to apply a new rule to prior conduct. *Peltier*, 422 U.S. at 535-536. That analysis did not survive the Court's later decision in *Griffith*, which jettisoned consideration of the purpose

of a new rule, and instead applied a uniform analysis grounded in the nature of the judicial process and the interest in similar treatment of similarly situated individuals. See pp. 43-44, *supra*.[5]

But *Peltier*'s analysis of the purpose of the exclusionary rule did not vanish from this Court's jurisprudence when retroactivity law changed. Instead, *Peltier*'s reasoning played a critical role in shaping the Court's decision in *Leon*, which created the good-faith exception to the exclusionary rule. See pp. 13-15, *supra*. *Leon* made clear that, although prior Fourth Amendment retroactivity decisions like *Peltier* did "not involv[e] the scope of the [exclusionary] rule itself," they did shed light on the "purposes underlying the exclusionary rule," 468 U.S. at 911, and provided "strong support" for the newly adopted good-faith exception. *Id.* at 913. Thus, rather than reviving the "discredited *Linkletter* retroactivity test" (Br. 20), a test that asks whether the exclusionary rule's purpose would be served by suppressing evidence from a search conducted in objectively reasonable reliance on appellate precedent fully accords with modern exclusionary-rule analysis under *Leon*.

2. Petitioner also errs (Br. 20-22) in suggesting that applying the good faith exception here would embrace an argument that the Court rejected in *Johnson*. Be-

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[5] *Griffith*'s analysis reveals petitioner's error in asserting (Br. 17) that this Court's retroactivity jurisprudence is simply a "specific application of the usual balancing test for the scope of the exclusionary rule." *Griffith* involved the retroactivity of a new equal-protection ruling, not a Fourth Amendment ruling. And to support his view, petitioner cites only three pre-*Griffith* cases. Br. 17-18 (citing *Peltier*, *Powell*, *Leon*). Modern jurisprudence has grounded retroactivity in entirely distinct considerations and does not balance policies in the manner that determines the exclusionary rule's scope. See pp. 43-44, *supra*.

cause the good-faith exception had not yet been adopted as of *Johnson*, see *Leon*, 468 U.S. at 913 ("As yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule."), that argument is curious on its face. But even examining the arguments about exclusionary policy made in *Johnson*, petitioner's argument fails. To understand why, *Johnson* must be understood in light of the Court's prior holding in *Peltier*, which *Johnson* left undisturbed. 457 U.S. at 562.

a. Even before this Court modified the exclusionary rule in 1984 by establishing the good-faith exception, it recognized in *Peltier* that the exclusionary rule should not apply in circumstances similar to those presented in this case. Before 1973, the Border Patrol conducted roving searches of vehicles near the border under the authority of a statute that authorized agents to conduct such searches "without [a] warrant" within a "reasonable distance" of the border and a regulation that fixed that distance at 100 miles. See *Peltier*, 422 U.S. at 539-540 & n.6 (citations omitted). Neither the statute nor the regulation addressed whether probable cause was necessary to search, see *ibid.*, and the Border Patrol conducted such searches without probable cause. In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), the Court invalidated such a search based on its conclusion that probable cause was necessary to conduct a roving-patrol search roughly 25 miles from the Mexican border.

Although *Almeida Sanchez* resolved the merits of that constitutional issue, the Court did not address the exclusionary rule. See *Peltier*, 422 U.S. at 542 n.12. Two years later, *Peltier* held that evidence from searches conducted before *Almeida-Sanchez* should not be

suppressed. *Id.* at 535-542. *Peltier* found it significant that, until *Almeida-Sanchez*, the Border Patrol's roving searches had been "'consistently approved by the judiciary'" and "upheld repeatedly against constitutional attack" in decisions by the Fifth, Ninth, and Tenth Circuits. *Id.* at 540-541 & n.8 (citation omitted). The Court explained that the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct", that this "deterrence rationale loses much of its force" if "the official action was pursued in complete good faith," *id.* at 539 (citation omitted); and that, therefore, evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542; accord *Herring*, 129 S. Ct. at 701-702; *Krull*, 480 U.S. at 348-349; *Leon*, 468 U.S. at 919. The Court accordingly held that suppression was unwarranted given "the purpose of the exclusionary rule" and the "uniform treatment of roving patrol searches by the federal judiciary" at the time of the search, even though *Almeida-Sanchez* overturned that circuit precedent. 422 U.S. at 542. *Peltier* explained that "we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm" "unless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court." *Ibid.*

Peltier also emphasized that the considerations underlying the exclusionary rule—which suppresses "relevant evidence * * * in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process"—distinguished the case from others

involving "new constitutional doctrines" designed to overcome practices that impair the "truth-finding function" and "raise[] serious questions about the accuracy of guilty verdicts." 422 U.S. at 535 (citation omitted). "*[I]n every case* in which the Court has addressed the retroactivity problem in the context of the exclusionary rule," *Peltier* explained, it "has concluded that any such *new* constitutional principle would be accorded only prospective application." *Ibid.* (emphases added); see *id.* at 535-537 (discussing cases). The Court endorsed that result, notwithstanding the argument that failing to apply a suppression remedy in *Peltier* would "stop dead in its tracks judicial development of Fourth Amendment rights." *Id.* at 543 n.13 (citation omitted).

That analysis strongly supports the application of the good-faith exception here. Indeed, the Court in *Leon* directly adopted much of *Peltier*'s rationale in establishing the good-faith exception. See, *e.g.*, *Leon*, 468 U.S. at 919 (exclusionary rule's deterrence function under *Peltier* warrants good-faith exception); *id.* at 920 n.20 (citing *Peltier*, 422 U.S. at 542, to explain that officers must "have a reasonable knowledge of what the law prohibits"); see also *Peltier*, 422 U.S. at 542 (denying suppression where officers followed "the *prevailing* statutory or constitutional norm") (emphasis added).

b. In *Johnson*, the Court moved away from *Linkletter*'s retroactivity doctrine. *Johnson* held *Payton* v. *New York*, 445 U.S. 573 (1982), to be retroactive in cases on direct review by adopting in part the rationale that later found favor in *Griffith*. 457 U.S. at 554-556. But it preserved the Court's preexisting exceptions to retroactivity—notably, for new rules that represented a "clear break with the past," a category that covered *Peltier*. *Id.* at 549, 558, 562 (citation omitted).

In so holding, *Johnson* rejected the government's reliance on *Peltier* to oppose retroactivity for *Payton*. 457 U.S. at 557-562. While the government's arguments did rely on exclusionary-rule considerations, *Johnson* rejected different arguments than the argument currently advanced. The Court first rejected an argument that all Fourth Amendment rulings should be non-retroactive; it then rejected an argument that retroactivity should be denied *unless* the officer violated "settled" law; it next rejected an extension of *Peltier*'s retroactivity logic beyond new decisions that "worked a 'sharp break' in the law"; and it finally rejected an argument that retroactive application would serve no purpose but to free a wrongdoer. *Ibid.*

Significantly, however, *Johnson* did not reject the exclusionary-rule policy arguments embraced in *Peltier*. Rather, the Court distinguished *Peltier* as involving "a near-unanimous body of lower court authority" that had upheld the lawfulness of the Border Control's roving searches before this Court overturned those decisions in a "'clear break' with the past." 457 U.S. at 558. *Johnson* recognized that *Peltier*'s approach was supported by "several" of the Court's decisions, *id.* at 558-559, and it made clear that it left "undisturbed" such "existing retroactivity precedents." *Id.* at 562; see *id.* at 551, 554. The Court explained that, in contrast to *Peltier*, the relevant law of the circuit "where [Johnson] was arrested" was "'unsettled,'" *id.* at 553 n.15 (citation omitted), and that *Peltier*'s retroactivity analysis did not apply to a decision of this Court resolving a "previously unsettled point of Fourth Amendment law." *Id.* at 560.

In short, rather than rejecting the good-faith argument advanced here, *Johnson* addressed a significantly different issue, in at least two respects. First, it did not

address the yet-to-be-recognized good-faith exception, which was not created until *Leon*. Second, it left intact *Peltier*'s holding for cases (similar to this one, see pp. 19-20, *supra*) in which this Court had "overturned a longstanding practice to which the Court had not spoken, but which a near-unanimous body of lower court authority had approved." 457 U.S. at 558. Later, in *Griffith*, the Court adopted a new approach to retroactivity that did not turn on policies specific to the Fourth Amendment. But by then, the Court had already separately incorporated those policy considerations into its exclusionary-rule analysis in *Leon*, and shortly after *Griffith*, the Court confirmed its good-faith jurisprudence in *Krull*. *Krull* is particularly relevant here, because the dissenters believed that failing to provide the remedy of exclusion for evidence seized in reliance on a statute later declared unconstitutional would create tension with retroactivity as articulated in *Griffith*. *Krull*, 480 U.S. at 368 (O'Connor, J., dissenting). But the Court in *Krull* dismissed that concern even while recognizing that the good-faith exception's remedial focus "can result in having a defendant, who has successfully challenged the constitutionality of a statute, denied the benefits of suppression of evidence." *Id.* at 354-355 n.11. This Court, therefore, has already concluded that good-faith exceptions to the exclusionary rule do not conflict with its retroactivity jurisprudence.

C. *Leon*, *Krull*, And *Herring* Are The Applicable Precedents

Instead of the retroactivity cases on which petitioner relies, the applicable precedents are this Court's good-faith precedents. Petitioner would cabin the good-faith cases to "ensuring compliance with existing precedents

instead of correcting erroneous precedents." Br. 43. That approach is incorrect for two reasons.

First, *Leon*, *Krull*, and *Herring* rest on the more fundamental, and directly applicable, point about the purpose and costs of the exclusionary rule. Exclusion is unwarranted when the purpose of deterring police misconduct is not sufficiently served to outweigh the costs. That principle has ramifications far beyond the enforcement of existing law. See pp. 14-18, *supra*.

Second, it is certainly not true that those decisions "concern compliance with existing precedents rather than compliance with the Constitution." Br. 45. The Constitution can speak directly to a practice even if no precedent has examined the precise issue. Cf. *Groh* v. *Ramirez*, 540 U.S. 551, 563 (2004) ("Given that the particularity requirement is set forth in the text of the Constituition, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."); *id.* at 565 n.8 (noting that the same test applied for objective good faith under *Leon*).

The good-faith test therefore does not, as petitioner suggests, limit the exclusionary rule to "compliance with * * * fixed [case] law." Br. 45. Rather, in this context, its application would simply recognize that when an officer has obtained evidence "in objectively reasonable reliance" on then-binding appellate precedent, the "marginal or nonexistent benefits" of suppression "cannot justify the substantial costs." *Leon*, 468 U.S. at 922.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The availability of the exclusionary rule to enforce newly-announced rules of criminal procedure traditionally has been considered a question of retroactivity law. Since *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court has followed a simple approach: The exclusionary rule is available to enforce the new rule in all cases not yet final – including the case announcing the new rule – but generally is not available after convictions have become final. This case should be decided by a routine application of that settled doctrine. Because Petitioner's conviction was not yet final when the Court handed down *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the exclusionary rule should be available to enforce *Gant* in Petitioner's case.

The government contends that the Court should reject this traditional approach under the logic of the good-faith exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897 (1984). According to the government, the exclusionary rule should not be available, either in the case announcing the new rule or in other cases on direct review, when the police reasonably rely on precedent at the time of the search. When reviewing challenges to Fourth Amendment precedent, the Court should announce new rules purely prospectively in the form of decisions that do not impact any pending cases.

The government's proposal should be rejected because it is a retroactivity argument disguised as a good-faith argument. The good-faith exception was

never meant to apply to errors in the judicial interpretation of the Fourth Amendment; that has always been the province of retroactivity doctrine. As a retroactivity argument, the government's proposal is flawed for the same reason all arguments for purely prospective decisionmaking are flawed. First, Article III does not permit prospective decisionmaking. The Constitution does not permit the Court to hand down new rules in advisory opinions. Second, purely prospective decisionmaking eliminates the incentives to challenge existing law upon which the adversary system rests.

Viewing the government's proposal as an application of the good-faith exception leads to the same result. The exclusionary rule to enforce new legal decisions "pays its way" because it achieves a significant deterrent benefit at a modest cost. The exclusionary rule deters constitutional violations by ensuring that the police have accurate rules to enforce. Its costs are modest because the Court has already created a long list of doctrines, such as inevitable discovery and plain error, that sharply limit the scope of the exclusionary rule when the Court overturns precedent. For these reasons, the Court should retain its traditional approach to the exclusionary rule and should reverse the Court of Appeals.

I. THIS IS A RETROACTIVITY CASE CONTROLLED BY *GRIFFITH V. KENTUCKY*, 479 U.S. 314 (1987).

Petitioner frames this case as a retroactivity case settled by *Griffith v. Kentucky*, 479 U.S. 314 (1987). The government frames it as a good-faith case governed by *United States v. Leon*, 468 U.S. 897 (1984). Resolving the disagreement requires understanding the difference between retroactivity and the good-faith exception. The difference explains why this is a retroactivity case governed by *Griffith*.

A brief history is helpful. In the 1960s, the Court invented the concept of "retroactivity" to blunt the impact of its new criminal procedure decisions that expanded constitutional protection. *See generally* Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965). The doctrine of retroactivity, first introduced in *Linkletter v. Walker*, 381 U.S. 618 (1965), limited when "a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). By limiting the scope of the exclusionary rule when the Court expanded constitutional protection, retroactivity ensured that the Court could continue to expand constitutional rights with minimal disruption to the criminal justice system.

During the *Linkletter* era, from 1965 to 1987, the general rule was that criminal defendants in the

pipeline were not entitled to benefit from new decisions expanding Fourth Amendment rights. The exclusionary rule was justified only insofar as it deterred police wrongdoing, the Court reasoned, and the police could not be deterred by constitutional rules that were not yet recognized. *See United States v. Peltier*, 422 U.S. 531, 536-39 (1975); *Desist v. United States*, 394 U.S. 244, 250-52 (1969). As a result, the exclusionary rule would only upset criminal cases and was deemed unnecessary. *Peltier*, 422 U.S. at 542.

Retroactivity proved a jurisprudential disaster, however, which led to its abandonment. The problem was that there was no principled way to limit the scope of the exclusionary rule when precedents were overturned. The exclusionary rule had to be available in the case announcing the new rule to ensure that defense attorneys had incentives to challenge the law and to ensure that the law was not announced in advisory opinions. *See Stovall v. Denno*, 388 U.S. 293, 301 (1967). On the other hand, the Court could not devise a principled way to limit the exclusionary rule in other cases on direct review at the time of the new decision. *See Desist*, 394 U.S. at 256-59 (Harlan, J., dissenting). The Court eventually recognized that no principled distinctions could be drawn, and it adopted a bright-line rule in 1987 that the new rule could always be enforced on direct review. *See Griffith*, 479 U.S. at 320-28.

Just before the *Linkletter* experiment came to a close, however, its principles inspired a newly-recognized good-faith exception to the exclusionary

rule. *See United States v. Leon*, 468 U.S. 897 (1984). The good-faith exception limits the scope of the exclusionary rule when the police rely on defective warrants, improper statutory authorizations, and erroneous database entries. *See id.* (warrants); *Illinois v. Krull*, 480 U.S. 340 (1987) (statutes); *Herring v. United States*, 129 S.Ct. 695 (2009) (database entries). At its inception, the good-faith exception drew explicitly from *Linkletter* retroactivity doctrine that pioneered the idea of limiting the exclusionary rule to the extent needed to deter violations. *See Leon*, 468 U.S. at 912-14.

Unlike retroactivity, the good-faith exception has thrived over time. The key difference is that the good-faith exception does not implicate the puzzling jurisprudential problems raised when the Supreme Court expands constitutional protection. The state of appellate caselaw is always fixed in good-faith cases, which permits the Court to use the standard of a "reasonably well trained officer" as a reference point to narrow the scope of the exclusionary rule. *Leon*, 468 U.S. at 922 n.23. The good-faith exception applies to reliance on minor errors that an officer with "reasonable knowledge of what the law prohibits" could miss, *id.* at 919 n.20, while it does not apply to reliance on major defects, such as warrants that contain obvious errors, that an officer with reasonable knowledge of what the law prohibits would recognize. *Id.* at 922-23. This principled limitation solves the jurisprudential problems that bedeviled retroactivity doctrine. It limits the exclusionary rule appropriately;

it provides the needed incentives to challenge police conduct; and it ensures that decisions are not handed down in advisory opinions.

This history explains why the government's position is a thinly-disguised retroactivity argument. The government's case is about the scope of the exclusionary rule when the Supreme Court overturns precedents. That is the classic question of retroactivity. While the government's position draws from principles of the good-faith exception, that is true only because the good-faith exception itself was based on *Linkletter*-era retroactivity precedents. No wonder that the government relies significantly on *Linkletter*-era retroactivity caselaw, such as *Peltier*, in its brief. U.S. Br. 48-54. The government is making a retroactivity claim based on *Linkletter* retroactivity cases and other doctrines that are themselves based on *Linkletter* retroactivity cases. It is a *Linkletter* retroactivity argument in all but name.[1]

The striking similarity between the government's brief and its brief in a *Linkletter*-era retroactivity case, *United States v. Johnson*, 457 U.S. 537 (1982),

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[1] Without citing any authority, the government contends that retroactivity merely concerns a criminal defendant's right to "seek" relief, whereas the exclusionary rule concerns whether relief may potentially be available. U.S. Br. 42-43. The distinction is meaningless. A rule that defendants may "seek" relief that is categorically unavailable is identical to a rule that defendants may not seek relief at all. In any event, the government's argument is foreclosed by *Danforth*, 552 U.S. at 271.

illustrates the point. *Johnson* presented the question of "[w]hether the exclusionary rule requires the suppression of evidence . . . where the entry occurred prior to . . . this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980)." Brief of United States in *United States v. Johnson* at i, *available at* 1981 WL 390084. The government's argument for why the exclusionary rule should not apply – in other words, why *Payton* should not apply retroactively – was the same argument it makes in this case. "The exclusionary rule is not a personal right but a procedural safeguard designed to deter *future* violations," the government reasoned. *Id.* at 11 (emphasis in original). Because the costs of exclusion are "extremely high," *id.* at 9, the exclusionary rule should not apply when officers act "in good faith compliance with then-prevailing constitutional norms." *Id.* (citing *Peltier*). "The deterrent purpose of the rule would not be served by suppressing evidence seized as the result of warrantless arrest entries that occurred prior to the announcement in *Payton*," the government reasoned. *Id.* at 11. "[A]ll that would be accomplished is the discharge of a wrongdoer." *Id.*

This argument should sound familiar, as it is the same argument the government makes today. When the Court rejected this argument almost 30 years ago, the Court described it as "an absurdity" that would "automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application." *Johnson*, 457 U.S. at 560 (emphasis in original). That characterization remains true.

II. THE GOVERNMENT'S POSITION OF TOTAL PROSPECTIVITY IS INCONSISTENT WITH MANY PRECEDENTS OF THIS COURT.

Because the government's position is a retroactivity argument in disguise, it helps to situate it within retroactivity law. As Justice Souter explained in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the Court can take three basic positions on retroactivity: *full retroactivity*, in which the exclusionary rule is available in the first case and all other cases on direct review; *selective prospectivity*, in which the exclusionary rule is available in the first case but not other cases on direct review; and *pure prospectivity*, in which the exclusionary rule is not available in any cases. *Id.* at 535-38 (Opinion of Souter, J.). During the *Linkletter* era, the Court adopted selective prospectivity in criminal cases. In *Griffith*, however, the Court "abandoned the possibility of selective prospectivity . . . in favor of completely retroactive application of all decisions to cases pending on direct review." *Id.* at 538 (Opinion of Souter, J.).

Viewed in this light, the government is advocating a rule of pure prospectivity. When the Court overturns circuit or Supreme Court Fourth Amendment precedent, the government contends, the exclusionary rule should not be available *in any case at all*. U.S. Br. 7-8. The exclusionary rule should not be available either in the case announcing the new rule

or in other cases on direct review. U.S. Br. 20. Not only should Petitioner not benefit from *Arizona v. Gant*, 129 S.Ct. 1710 (2009), but neither should Gant himself. U.S. Br. 48. Admittedly, this approach solves the problem of treating the first case differently from other cases. No defendant is singled out when all defendants lose.

On the other hand, pure prospectivity raises two problems that had led the Court to reject pure prospectivity during the *Linkletter* era. The first problem is "the necessity that constitutional adjudications not stand as mere dictum . . . rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies," and the second problem is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law." *Stovall*, 388 U.S. at 301. The government contends that these concerns can be ignored. It characterizes them as dicta from a single Sixth Amendment case decided long ago. U.S. Br. 25-26. But these two concerns appear in many decisions, including several Fourth Amendment decisions, both during and after the *Linkletter* era. Those precedents show that the Court has repeatedly rejected the government's proposed rule of total prospectivity.

Consider the Fourth Amendment rule announced in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the Government argued that the agents' reliance on precedents *Katz* overturned should excuse the agents' unconstitutional search. The Court disagreed, applied the new rule to Katz's case, and reversed his

conviction. *See id.* at 356, 359. Two years later, in *Desist v. United States*, 394 U.S. 244 (1969), the Court ruled that *Katz* did not apply retroactively to other cases on direct review when *Katz* was decided. *Desist* then reaffirmed *Stovall*'s instruction that the exclusionary rule was available in the first case to announce the new rule. *Id.* at 254 n.24. Although "Katz himself benefited from the new principle" announced in his case, and "to that extent the decision has not technically been given wholly prospective application," giving Katz the benefit of the new rule was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.* (quoting *Stovall*, 388 U.S. at 301). *See also Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part) (noting that prospective rulemaking can deter defendants "from asserting rights bottomed on constitutional interpretations different from those currently prevailing").

The Court reiterated the point in *United States v. Peltier*, 422 U.S. 531 (1975), a case the government considers "strong support[]" for its position. U.S. Br. 52. After holding that Peltier was not entitled to the benefit of the new Fourth Amendment rule announced in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the Court addressed the dissent's argument that it was wrong to treat Peltier and Almeida-Sanchez differently. The Court repeated *Stovall*'s conclusion that the exclusionary rule had to be available in the case announcing the new rule:

"[W]here it has been determined, as in a case such as *Linkletter*, that an earlier holding such as *Mapp* is not to be applied retroactively, it has not been questioned that Mapp was entitled to the benefit of the rule enunciated in her case." *Peltier*, 422 U.S. at 542 n.12 (citing *Stovall*, 388 U.S. at 300-01).

Griffith made the same point when it ended the *Linkletter* era. *See Griffith*, 479 U.S. at 327-28 (recognizing that the defendant in the case announcing the new rule "receives the benefit of the new rule."). The point was repeated yet again in *Teague v. Lane*, 489 U.S. 288 (1989), soon after the *Linkletter* era ended. In *Teague*, the Court was asked to rule on a challenge to jury venire selection in criminal cases brought in a habeas proceeding. The plurality opinion of Justice O'Connor – joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy – acknowledged that the Court "would have to give petitioner the benefit of that new rule" if the Court "recognize[d] the new rule" in *Teague*. *Id.* at 315 (O'Connor, J., plurality opinion). Doing so was "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Id.* (quoting *Stovall*, 388 U.S. at 301).

Finally, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), five members of the Court wrote or joined opinions rejecting pure prospectivity. Justice Souter, joined by Justice Stevens, reasoned that in criminal cases, "retroactive application could hardly have been denied the litigant in the law-changing decision itself." *Id.* at 537 (Opinion of Souter, J.). He

continued: "A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether." *Id.* (Opinion of Souter, J.). Justice Scalia, joined by Justices Marshall and Blackmun, went further, concluding that both pure prospectivity and selective prospectivity are unconstitutional. *See id.* at 549 (Scalia, J., concurring in the judgment).

As these authorities indicate, the Court's rejection of pure prospectivity is deeply rooted in its jurisprudence. Even during the *Linkletter* era, the Court always enforced its new decisions with the exclusionary rule. Although the government presents its argument as a modest extension of the good-faith exception, its position is quite radical: It rejects a universal practice of this Court that has been repeatedly articulated over several decades and that has far-reaching implications.

III. IF THE EXCLUSIONARY RULE IS NOT AVAILABLE, THE LIMITS OF ARTICLE III WILL PROHIBIT THE COURT FROM ADJUDICATING DEFENSE CHALLENGES TO FOURTH AMENDMENT PRECEDENTS IN CRIMINAL CASES.

The government's proposed rule would require the Court to decide challenges to existing Fourth Amendment rules in advisory opinions. By seeking to

overturn precedent, the defendant would necessarily concede at the outset that he could not benefit from any change in the law sought. There would be no way for a defendant to obtain relief. If the Court upheld its controlling precedent, the defendant would lose on the merits; if the Court overturned its controlling precedent, the defendant would lose on the good-faith exception. The outcome of the litigation would always be the same.

Article III does not permit prospective decisionmaking for two reasons. First, "prospective decisionmaking is quite incompatible with the judicial power," and "courts have no authority to engage in the practice." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring). Justice Scalia has been the strongest proponent of this view, and the Court recently indicated that it has commanded a majority of the Court and "should inform [the Court's] analysis of the issue[.]" *Danforth*, 552 U.S. at 287. *See generally* Br. 22-25.

The government does not address this argument. As *amici curiae*, the States respond only to extol the practical benefits of pure prospectivity. Pure prospectivity "would achieve the salutary objective of implementing change in law enforcement practices," the States contend, "while at the same time avoiding the harmful impact to the administration of justice." States Br. 18. However salutary that objective might be, "prospective decisionmaking is incompatible with the judicial role." *American Trucking Association v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment).

Article III does not permit such decisionmaking for a second reason. No case or controversy would exist under Article III to adjudicate such cases because any ruling by the Court would have no impact on the parties.[2] The absence of any impact would make the defendant's injury irredressable and eliminate Article III standing. Br. 25-27. The Government responds that if the application of the good-faith exception in *Leon* does not eliminate a case or controversy, then a good-faith exception here should not, either. U.S. Br. 33-34. This argument overlooks the critical difference between the good-faith exception of *Leon* and the significantly different rule the government advocates here.

As explained earlier, the Court has carefully limited the *Leon* good-faith exception to police reliance on minor errors, which permits defendants to obtain exclusion of the evidence if the errors were major ones. *See, e.g., Leon*, 468 U.S. at 923-34; *Krull*, 480 U.S. at 353-55. This limitation ensures a possibility of reversal on appeal because courts must make a judgment call of whether the error is sufficiently significant that "a reasonable officer should have

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[2] *Camreta v. Greene*, 09-1454, and *Alford v. Greene*, 09-1478, argued on March 1, raise similar issues in the qualified immunity context. The lack of case or controversy would be even clearer here, however. Criminal cases do not raise concerns from qualified immunity law that a lower court ruling against the government on the merits but for the government on immunity may act as the equivalent of an unreviewable injunction against the government.

known that the [warrant or] statute was unconstitutional." *Krull*, 480 U.S. at 355. In some cases, the chances of reversal will be significant. In others, they will be remote. Either way, a theoretical possibility of reversal always exists. Injuries can be redressed and a case or controversy exists.

Under the government's proposed rule, however, there is no theoretical possibility of relief. The Question Presented in this case is limited to cases in which binding appellate precedent authorized the search. U.S. Br. i. Under the government's approach, relief is a logical impossibility in all such cases. Because reliance on binding caselaw will always be reasonable, U.S. Br. 7, the good-faith exception will always apply. The only conceivable options will be victory by the government on the merits or victory by the Government under the good-faith exception. The chance of a ruling for the defendant will be precisely zero, and everyone will know this at the outset. Article III does not permit such *faux* litigation.

IV. THE EXCLUSIONARY RULE MUST BE AVAILABLE TO ENSURE PROPER DEVELOPMENT OF THE LAW AND THEREFORE DETER CONSTITUTIONAL VIOLATIONS.

Assuming it is permitted by Article III, a regime of pure prospectivity is undesirable because it eliminates the only realistic way for the Court to correct constitutional errors. The possibility of suppression triggers defense challenges. Defense challenges permit the Court to reconsider circuit and Supreme

Court precedent. If the good-faith exception eliminates any possibility of relief to defendants who seek to challenge precedents, few if any challenges will be brought. The development of the law will become a one-way street in favor of expanded government powers. The availability of the exclusionary rule therefore deters constitutional violations by ensuring that the precedents upon which the police rely are themselves correct. Br. 30-43.

A. Incentives to Raise Arguments Are Properly Considered.

The government responds that the exclusionary rule is exclusively concerned with police incentives to follow existing law, and that incentives on defendants to raise challenges to that law cannot be considered. U.S. Br. 22-26. That is incorrect. Litigation incentives on defendants to challenge police action are longstanding concerns in exclusionary rule jurisprudence. *See, e.g., Stovall*, 388 U.S. at 301; *Leon*, 468 U.S. at 924, n.25; *Krull*, 480 U.S. at 353-54; *James B. Beam Distilling Co.*, 501 U.S. at 537 (Opinion of Souter, J.); *Mackey*, 401 U.S. at 680 (Harlan, J., concurring in part and dissenting in part); *Peltier*, 422 U.S. at 554-55 (Brennan, J., dissenting). *See also Garner v. Memphis Police Dept.*, 8 F.3d 358, 362 (6th Cir. 1993) (describing as "hornbook law" the rule that new standards are applied in the case announcing them because "[o]therwise parties would have no incentive to argue for such a rule because they would get no benefit from winning the case").

James v. Illinois, 493 U.S. 307 (1990), demonstrates the point. In *James*, the Court rejected an exception to the exclusionary rule permitting the use of evidence obtained in violation of the Fourth Amendment for impeachment of witnesses other than the defendant. The Court reasoned that the exception likely "would chill some defendants from presenting their best defense and sometimes any defense at all" given the realities of the criminal trial process. *Id.* at 314-15. If chilling effects on decisions to call witnesses at trial can determine the scope of the exclusionary rule, then surely chilling effects on making arguments the Court needs to interpret the law properly can do so as well.

B. An Exception For Reliance on Overturned Law Would Eliminate Incentives to Challenge Precedent.

The government contends that defendants would challenge existing precedents under its proposal because creative defense lawyers would distinguish their cases from binding precedents to avoid the bar on relief. U.S. Br. 29-30. This argument rests on a misunderstanding of the Question Presented as well as the nature of Fourth Amendment rules.

The Question Presented in this case is limited to searches authorized by binding precedent. Br. i; U.S. Br. i. If defense attorneys can distinguish a precedent, however, that precedent is not "binding." As a result, how defense attorneys might try to

distinguish precedents in other cases, when proper application of the law remains unclear, is irrelevant. The government's apparent misunderstanding is echoed in its acknowledgement, tucked away in a footnote, that its rule "might mean that direct challenges" to Supreme Court precedent "could not result in suppression of evidence even if this Court overruled the decision." U.S. Br. 32 n.6. The government dismisses such instances as a "singular situation," *id.*, but its characterization is puzzling: That situation is the central scenario contemplated by the Question Presented.

The government's assertion that defense attorneys can readily distinguish precedents also ignores the Court's strong preference for enforcing the Fourth Amendment with bright-line rules. *See New York v. Belton*, 453 U.S. 454, 458 (1981). Consider the law of routine traffic stops. Probable cause of a traffic violation *always* allows the stop. *Whren v. United States*, 517 U.S. 806, 818 (1996). Officers can *always* order drivers out of the car. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). Officers can *always* arrest the driver if a violation occurred. *City of Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001). Officers can *always* search the driver's person incident to arrest. *Robinson v. United States*, 414 U.S. 218, 235 (1973). And until *Gant*, officers could *always* search the passenger compartment of the car. *Belton*, 453 U.S. at 458. These bright-line rules are the bread-and-butter of Fourth Amendment law. By this Court's design, not even the most creative of defense attorneys can work

around them. The only realistic way to challenge them is to do so directly.

The government asserts that experience with *Leon* and *Krull* proves that good-faith exceptions do not eliminate incentives to challenge police conduct. U.S. Br. 30-31. Again, this claim overlooks the difference between the good-faith exception adopted in *Leon* and *Krull* and the quite different doctrine urged here. Officers can be expected to know existing law. As a result, *Leon* and *Krull* considered what a "reasonably well-trained officer" who had "reasonable knowledge of what the law prohibits" would do. *Leon*, 468 U.S. at 922 n.23, 919 n.20. The Court maintained incentives to challenge police practices by retaining the exclusionary rule whenever a reasonable officer "should have known that the [warrant or] statute was unconstitutional." *Krull*, 480 U.S. at 355. The exclusionary rule always remains a possibility. Indeed, the good-faith exception of *Leon* and *Krull* makes only a modest difference to the defendant's argument. Instead of arguing that a defect existed, the defendant must argue that a defect existed and was significant enough that a reasonably well-trained officer would notice. *Krull*, 480 U.S. at 354.

The same is not true for the government's proposed exception. Officers can be expected to know existing law, but they cannot be expected to know when binding appellate caselaw was wrongly decided. That is especially true when the Court eventually divides, 5-4, on what rule the Constitution requires. *See Gant*, 129 S.Ct. at 1725-26. If a reasonable belief

that a search is constitutional wards off the exclusionary rule, then binding appellate precedent allowing a search will always render suppression an impossibility. A defendant will have no path to relief, eliminating the incentive to challenge precedent.

The government also claims that precedents can be challenged because caselaw in some jurisdictions does not foreclose challenges to that caselaw brought in other jurisdictions. U.S. Br. 32. This argument precludes challenges to Supreme Court precedents, however, as the government appears to recognize. *Id.* at n.6. Further, if the police can reasonably rely on binding circuit precedent in federal court, it is unclear why the exception stops there. The government's proposed standard of objective reasonableness mirrors the language of qualified immunity law, *see Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009), and yet qualified immunity law excuses liability unless illegality was clearly established – a standard that not only allows officers to rely on state courts and other circuits, but allows officers to avoid liability when no circuit has ruled or when circuits disagree. *Id.* at 822-23; *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Perhaps the government can explain how its standard differs from qualified immunity, but it has not done so.

C. Civil Suits Against Municipalities Cannot Provide A Substitute Remedy.

Responding to Petitioner's argument that alternative remedies are insufficient, Br. 39-43, the government

speculates that precedents could be challenged in civil actions against municipalities. U.S. Br. 34-37. The government does not cite a single case in which this has ever occurred. And no wonder: Enforcement of existing law cannot establish municipal liability. *See Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 791-93 (7th Cir. 1991). Municipal liability requires a culpable decision either to fail to train or the adoption of an unlawful policy or practice, neither of which can be satisfied if the municipality simply follows binding law. *Id.* at 791 ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing . . . [the] law"); *Crowder v. Sinyard*, 884 F.2d 804, 830-31 (5th Cir. 1989).

Even if this barrier were overcome, bringing even one such action would require an unlikely string of fortuitous circumstances. The challenged practice would have to be one engaged in by local officers; the municipality would need to train its officers explicitly on that aspect of the law; counsel would need to be found to bring a suit with an extremely small chance of victory; innocent plaintiffs who were subjected to the challenged practice would need to be found to circumvent *Heck v. Humphrey*, 512 U.S. 477 (1994); the plaintiffs would need to bring suit against a municipality that followed existing law with knowledge that any damages would be minimal if not zero; busy trial judges would need to proceed to discovery even though binding precedent made the lawsuit

meritless; and the Supreme Court would need to grant review of what would likely be an unpublished one-page affirmance in order to reach out and reconsider the precedent. The chances this might happen, even just once, are remote.

V. THE COSTS OF THE EXCLUSIONARY RULE TO ENFORCE NEW PRECEDENTS ON DIRECT REVIEW ARE MODEST.

Availability of the exclusionary rule to enforce new legal decisions does not mean suppression will be common. Searches that predate the newly-announced rule often will satisfy it. Br. 51-53. Even when searches violate the newly-announced rule, evidence will be suppressed relatively infrequently. Doctrines such as inevitable discovery, independent source, attenuated basis, standing, plain error and harmless error sharply limit the impact of newly-announced rules. Br. 53-58. The *Belton* cases after *Gant* reveal the dynamic: In the significant majority of the known cases, the government won the case even without the good-faith exception it seeks here. Br. at 51-58. The benefits of the exclusionary rule are well worth these modest costs.

The government responds that the exclusionary rule imposes "grave" costs because suppression interferes with the truth-finding function of criminal trials. U.S. Br. 37-38. This abstract point is largely nonresponsive. Although suppression can be costly, its cost depends on how often convictions will be

overturned rather than its impact per overturned conviction. *See James*, 493 U.S. at 319-20 ("When defining the precise scope of the exclusionary rule, however, we must focus on systemic effects of proposed exceptions to ensure that individual liberty from arbitrary or oppressive police conduct does not succumb to the inexorable pressure to introduce all incriminating evidence, no matter how obtained, in each and every criminal case.").

The government replies that it is "difficult to estimate how often other legal doctrines might salvage cases," U.S. Br. 41, but such caution is misplaced. Full retroactivity has been in place since *Griffith* in 1987. The quarter-century of experience provides ample empirical evidence to gauge how often suppression results. *Belton* cases following *Gant* provide a particularly useful dataset: The wide availability of opinions in easily-searchable online databases makes estimates of how such cases fared unusually easy to make. In addition, the cost/benefit analysis required by exclusionary rule doctrine has never required mathematical precision. *United States v. Ceccolini*, 435 U.S. 268, 280 (1978).

Similarly unpersuasive is the government's claim that the exclusionary rule to enforce new decisions generates disrespect for the law. U.S. Br. 38-39. The public respects the law when courts act like courts and enforce the rules they announce. *See Griffith*, 479 U.S. at 322-23. In contrast, pure prospectivity provides an "ignoble shortcut to conviction" that reduces

the Constitution to "an empty promise." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Further, the exclusionary rule has been available on direct review since *Griffith* in 1987. The government offers no evidence that the public has disrespected the law as a result of *Linkletter*'s demise. Also, the exclusionary rule is full of holes already. Even when available in theory, it will be applied in practice only when necessary. Br. 51-58.

Finally, the government posits that fears of suppression may overdeter the police. U.S. Br. 39-40. According to the government, cops on the street may be so worried that the Court will expand constitutional protection that they "hedge against unknown future jurisprudential changes" and decline to protect the public. U.S. Br. 40. This speculation is absurd. The exclusionary rule has been available in every case on direct review since *Griffith* in 1987. There is no evidence – the government points to none – that any police officer has been frozen by fear that the Court might overturn binding law.

Common sense explains why. Expansions of Fourth Amendment protection are rare. When they occur, doctrines such as inevitable discovery, independent source, plain error, and harmless error sharply limit the exclusion of evidence. Br. 51-58. In the rare case suppression may result, qualified immunity ensures that officers never face personal liability for reliance on binding caselaw. *See Gant*, 129

S.Ct. at 1722 n.11. In these circumstances, rational officers rely on binding precedent without hesitation.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 09-11328

IN THE

Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Fourth Amendment require suppression of evidence resulting from a search when (1) the search was considered legal under controlling precedent in the jurisdiction at the time of the search, but (2) by the time of the trial or appeal that precedent has been overruled, such that the search is not considered legal under the later view of the law?

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In The

Supreme Court of the United States

Willie Gene Davis,

Petitioner,

vs.

United States of America,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a motion to suppress evidence on Fourth Amendment grounds. Suppression

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1 The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

on this basis is contrary to the basic function of a criminal trial to find the truth and reach a just verdict. The exclusionary rule should therefore be limited to the narrowest possible scope. Suppression in this case, where it would contribute nothing to the deterrence that is the sole modern basis of the exclusionary rule, is contrary to the interests GJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant Willie Gene Davis was a passenger in a car stopped for excessive noise by an officer of the Greenville, Alabama Police Department. See Report and Recommendation of the Magistrate Judge, J. A. 99. The driver was arrested for driving under the influence. Davis identified himself to the officer as Ernest Harris, but a bystander identified him as Willie Gene Davis. J. A. 100. He was arrested for giving false information to a law enforcement officer, handcuffed, and placed in the patrol car. A search of the car revealed a revolver in the pocket of Davis's jacket. J. A. 100-101.

Davis was indicted for possession of a firearm by a felon, 18 U. S. C. §922(g)(1). See *United States* v. *Davis*, 598 F. 3d 1259, 1261 (CA11 2010). The trial court denied his motion to suppress the gun. Davis was convicted and sentenced to 220 months in prison. See *id.*, at 1262.

On appeal after this Court's decision in *Arizona* v. *Gant*, 556 U. S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Eleventh Circuit held there was a Fourth Amendment violation under *Gant*. *Davis*, 598 F. 3d, at 1263. However, the search was consistent with the Eleventh Circuit's prior interpretation of the controlling Supreme Court precedent. See *id.*, at 1262.

The Court of Appeals then held that the good-faith exception allows the use of the evidence. *Id.*, at 1268. The circuits are divided on this point. See *id.*, at 1268.

SUMMARY OF ARGUMENT

The exclusionary rule causes a miscarriage of justice in the cases where it is applied, frustrating rather than assisting the search for truth. It is not inherent in the Fourth Amendment and was unknown at the time of the adoption of the Bill of Rights. The rule continues to exist solely by the utilitarian rationale of deterring police misconduct. It should be confined to the minimum possible scope.

Recognition of the good-faith exception applied by the Eleventh Circuit in this case would not prevent this Court from reviewing practices established by circuit precedent. Given the very large number of courts whose decisions are reviewable by this Court and no other, it is likely that some courts will differ and provide a vehicle for review from a jurisdiction where the rule is not clearly established. *Arizona* v. *Gant* itself demonstrates this, coming from a state whose courts chose to buck the trend.

Experience with the *Teague* rule and qualified immunity show us that broader limits on remedies than the one considered here do not stop litigants from bringing cases to this Court. The contours of what is "clearly established" are rarely clearly established, and parties regularly couple their arguments on the underlying rule with an argument that relief is not precluded by the state of prior law.

The judicial power limitations of Article III do not prevent a federal court from establishing a precedent on a question of law in a case where the party prevailing

on that point is ultimately found not to be entitled to the remedy he seeks. This is regularly done in qualified immunity cases, and for eight years addressing the issues in that order was mandatory.

A party does not lack standing to make a claim and seek a remedy merely because he is ultimately found not to be entitled to the remedy. The element of standing analysis known as "redressability" goes to whether the remedy sought would redress the grievance if granted. Whether the litigant is legally entitled to that remedy goes to merits of the claim. It is not a standing issue and does not implicate the existence of an Article III "case" or "controversy."

Recognizing a limit on remedies for claims that are valid under current interpretation of the law but would have been rejected under the prior interpretation is not a return of the discredited *Linkletter* approach to retroactivity. Just the opposite, this view of the problem is fully consistent with the approach proposed by Justice Harlan and ultimately adopted in *Griffith* v. *Kentucky* and *Teague* v. *Lane*.

Application of the exclusionary rule is not necessary in this case, and therefore it should not be applied.

ARGUMENT

I. The exclusionary rule produces a miscarriage of justice in the case before the court and should be confined to its minimum possible scope.

Ask the proverbial people on the street what is a just result in a criminal case, and most will think it is a simple question. The defendant should be convicted if he is guilty and acquitted if he is innocent. Most of the rules governing criminal trials, including those in the

Constitution, are designed to reach a just result, a verdict that reflects the truth. Defendants have a right to confront witnesses, for example, because cross-examination is the " 'greatest legal engine ever invented for the discovery of truth.' " *California* v. *Green*, 399 U. S. 149, 158 (1970) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)).

The Fourth Amendment exclusionary rule is the exact opposite. When it is invoked, it is almost always used to suppress reliable evidence. If it affects the result of trial, the effect is virtually always to produce a wrong verdict, not a right one. The exclusionary rule is the greatest legal engine ever invented for the suppression of truth.

No other doctrine in modern American law has so seriously diminished the law and the judiciary in the public mind. In 1961, this Court cited a judicial decision in California for the growing acceptance of the exclusionary rule, see *Mapp* v. *Ohio*, 367 U. S. 643, 651-652 (1961), but in 1982 the people of California repudiated that decision by direct vote. See *California* v. *Greenwood*, 486 U. S. 35, 44 (1988); Cal. Const., Art. I, § 28(f)(2) (renumbered in 2008). In 1996, a federal trial judge's decision suppressing evidence was denounced by the highest elected officials of both major political parties, with the Speaker of the House calling for the judge's resignation, and the President indicating that he would do the same if the judge did not reverse himself. See Perrin, Caldwell & Chase, If It's Broken Fix It, 83 Iowa L. Rev. 669, 671-672, and n. 3 (1998). The unfortunate trial judge was not to blame, of course. He was bound to follow this Court's precedents, however misguided. "The buck stops here." Harry Truman, quoted in J. Bartlett, Familiar Quotations 788 (15th ed. 1980).

The exclusionary rule was first adopted for federal courts in a case where the activity in question was simply the importation of glass, and the only crime was not giving the government its share of the proceeds. See *Boyd* v. *United States*, 116 U. S. 616, 617-618 (1886). In such a case, the application of the rule to deny the government the benefit of an illegal search does not appear to be such a grave injustice. Similarly, the public's sense of justice is not offended if the government's misconduct prevents it from prosecuting the victimless crime of use of the mail for gambling. See *Weeks* v. *United States*, 232 U. S. 383, 386 (1914). In contrast, the case where Judge Cardozo famously rejected the rule for New York courts involved a crime against an individual. See *People* v. *Defore*, 242 N. Y. 13, 17, 150 N. E. 585, 586 (1926). In the first half of the twentieth century, the widespread rejection of this rule in state courts, see *Wolf* v. *Colorado*, 338 U. S. 25, 29 (1949) (overruled in *Mapp*), while it was accepted without great controversy in federal courts may be due in part to the differences in the character of state and federal law enforcement. Crimes by one individual against another were usually state-law matters, while federal offenses were more often crimes against the government itself with no identifiable individual victim. See *California* v. *Minjares*, 443 U. S. 916, 920-921 (1979) (Rehnquist, J., dissenting from denial of stay). Cardozo's nightmare scenario of suppressing the body of the murder victim and letting a murderer go free, *Defore*, *supra*, at 24, 150 N. E., at 588, was a greater danger in state court, and it is this scenario that presents the injustice of the exclusionary rule in its starkest form.

An exclusionary rule limited to so-called victimless crimes would be less problematic than the rule we have at present. Proposals along this line have been made, see 1 W. LaFave, Search and Seizure § 1.2(e), pp. 50-53

(4th ed. 2004) (describing and criticizing proposals), but none has been adopted. In addition, the present case illustrates that some crimes cannot be neatly categorized as victimless or not. The crime is possession of a gun by a convicted felon. There is no identifiable victim of this offense, but the recent tragedy in Tucson reminds us of the potentially horrific consequences to innocent people of guns being in the wrong hands. The parameters of the exclusionary rule and its exceptions must therefore be set with the understanding that they will apply to murder cases, gun cases, drug cases, and revenue cases alike.

The existence of this great legal engine for the suppression of truth can be supported, if at all, only by the weightiest of considerations. Rationales advanced in the past, such as interrelation with the Fifth Amendment, being a necessary corollary of the Fourth Amendment, or protecting the integrity of courts, have been abandoned, leaving deterrence of police misconduct as the sole basis for the rule. See *United States* v. *Leon*, 468 U. S. 897, 905-906, 921, n. 22 (1984); *Herring* v. *United States*, 555 U. S. 135, 129 S. Ct. 695, 700, n. 2, 172 L. Ed. 2d 496, 504-505, n. 2 (2009). Because this is a purely utilitarian rationale, with no basis in the text or history of the Constitution, it necessarily involves a weighing of costs and benefits. See *Leon*, *supra*, at 906-907; *Hudson* v. *Michigan*, 547 U. S. 586, 594-595 (2006). While this Court has implicitly decided, by not overruling *Mapp*, to keep the exclusionary rule in the core of cases to which it applies, in cases outside the core the result of the weighing has regularly come out against exclusion. See *Leon*, *supra*, at 922 (good-faith reliance on warrant); *Hudson*, *supra*, at 599 (knock-and-announce); *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 369 (1998) (parole revocation hearings); *Illinois* v. *Krull*, 480 U. S. 340, 353 (1987) (reliance on statute); *Arizona* v. *Evans*, 514

U. S. 1 (1995) (error by court employee); *Herring*, 129 S. Ct., at 702, 172 L. Ed. 2d, at 507 (mistake of police employee attenuated from search).

That is the correct result, because the cost of deliberately blinding a criminal trial court to the truth is enormous, not "modest" as petitioner contends. Cf. Brief for Petitioner 49-60. How many violent criminals need to go free to prey again before the cost of the exclusionary rule is greater than "modest"? One.

For a state to employ the rules of evidence to deny a defendant the core of his defense without a compelling justification is a denial of due process of law. See *Chambers* v. *Mississippi*, 410 U. S. 284, 302-303 (1973). The people and the victims are also entitled to due process of law. See *Stein* v. *New York*, 346 U. S. 156, 197 (1953), overruled on other grounds in *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). In a sense, a court commits a *Chambers* violation against the people every time it invokes the exclusionary rule.

In the present case, the petitioner concedes that the deterrence rationale is absent.[2] He makes the remarkable claim that this Court should require a miscarriage of justice in the case before it for the purpose of insuring a steady stream of vehicular traffic aimed at changing settled law in favor of criminal defendants. The argument depends on an exaggerated estimate of the effect that the rule adopted by the Eleventh Circuit would have.

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2. An *amicus* argues that deterring searches presently authorized but which might be disapproved in the future is a desirable result. See Brief for National Association of Federal Defenders as *Amicus Curiae* 4-8. It is not. See Brief for the United States 39-40.

II. Petitioner's fear of insufficient grist for the Fourth Amendment mill is unfounded.

Petitioner claims, "This is a case about the role of the Supreme Court in the development of Fourth Amendment law." Brief for Petitioner 7. He fears that by adopting the rule followed by the Eleventh Circuit in this case, this Court will disable itself from changing the law in favor of broader interpretation of the Fourth Amendment, and "the direction of Fourth Amendment law would become a one-way street in favor of expanded government power." Brief for Petitioner 9. These fears are unfounded. The argument gives insufficient weight to the multiplicity of America's courts and the creativity of its lawyers.[3] It gives too much weight to Article III limitations, which are not as broad as petitioner makes them out to be.

A. *Three Score and Four Courts.*

Petitioner contends that if searches clearly authorized by controlling case law at the time of the search are exempt from the exclusionary rule, "Article III would leave the Court unable to review challenges to circuit court or Supreme Court Fourth Amendment precedents in criminal cases." Brief for Petitioner 22-23. *Arizona* v. *Gant*, 556 U. S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), itself disproves this assertion for circuit precedents. For Supreme Court precedents, there is more of an issue, but not so great as to require the drastic remedy of an intentional miscarriage of justice in the criminal case.

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3. Petitioner also underestimates the utility of civil "policy or custom" suits for challenging established law. See Brief for United States 34-37.

This Court is unique in a number of ways, one of which is the breadth of American courts it has jurisdiction to review, none of which is required to follow the precedents of any of the others. The federal circuit courts of appeals are not required to follow each others' precedents. See *Hart* v. *Massanari*, 266 F. 3d 1155, 1172-1173 (CA9 2001). The highest court of each state is not required to follow the precedents of other states or of the federal court of appeals for its circuit. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997) (citing *Lockhart* v. *Fretwell*, 506 U. S. 364, 375-376 (1993) (Thomas, J. concurring)); *id.*, at 66, n. 21.

There are eleven numbered federal circuits and the D.C. Circuit deciding Fourth Amendment questions in federal criminal cases. The Court of Appeals for the Armed Forces also decides criminal cases, sometimes involving considerations unique to the military but sometimes not. See, *e.g.*, *United States* v. *Scheffer*, 523 U. S. 303 (1998) (polygraph evidence, straight application of civilian precedents). There are 50 state high courts doing the same in state cases, plus the District of Columbia Court of Appeals, which is the "highest court of a State" for this purpose. See 28 U. S. C. § 1257(b); *M. A. P.* v. *Ryan*, 285 A. 2d 310, 312 (D. C. 1971) (D. C. Circuit precedents after effective date of D. C. Court Reform Act in 1971 not binding precedent in D. C. Court of Appeals). Supreme Court Rule 10 indicates that a split of authority among circuits and state high courts is the primary reason for grant of certiorari.

That comes to 64 independent courts, all rendering independent interpretations of what this Court's Fourth Amendment precedents mean, none bound to follow any of the others. Even if we assume for the sake of argument that the rule at issue in this case would have precluded rendering the *Gant* decision in a

case from the Eleventh Circuit, but see Part III, *infra*, it would not have precluded rendering it in *Gant* itself.

The Arizona Attorney General asserted in the certiorari petition in *Gant* that the Arizona Supreme Court decision was contrary to the interpretation of *New York* v. *Belton*, 453 U. S. 454 (1981), followed in numerous federal circuits, although not specifically mentioning the Eleventh. See Pet. for Cert. in *Arizona* v. *Gant*, No. 07-542, pp. 15-16. Indeed it was, and by affirming the Arizona decision in *Gant*, this Court did effectively review and reject the contrary Eleventh Circuit precedent, along with the others. How would this process have differed if the exclusionary rule exception now under consideration had been in force then? Not at all. Gant's Fourth Amendment claim would have been considered on the merits because there was no clearly established authority to the contrary in Arizona, and the Arizona Supreme Court had no obligation to follow the contrary Ninth Circuit precedent. See *State* v. *Gant*, 216 Ariz. 1, 6, 162 P. 3d 640, 645 (2007) (declining to follow, inter alia, *United States* v. *Osife*, 398 F. 3d 1143, 1144, 1146 (CA9 2005)); see also *State* v. *Gant*, 202 Ariz. 240, 243, ¶7, 43 P. 3d 188, 191 (App. 2002) (initial appeal: "whether *Belton* applies to Gant's situation 'appears to be a matter of first impression in Arizona' ").[4]

The state court in *Gant* further noted that two other state high courts had come to similar conclusions. See 216 Ariz., at 6, n. 4, 162 P. 3d, at 645, n. 4. The Arizona Attorney General criticized these decisions as failing to discuss *Belton*, see Pet. for Cert. in *Arizona* v.

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4. In the present case, there was no split between the state and federal courts. See *State* v. *Jemison*, No. CR-09-0399, 2010 Ala. Crim. App. Lexis 142, *41-42 (Dec. 17, 2010) (citing *Sheffield* v. *State*, 606 So. 2d 183, 187 (Ala. Crim. App. 1992)).

Gant, No. 07-542, p. 17, but that is beside the point for the present purpose. The rule relied on by the police officers in this case was not clearly established in at least three jurisdictions prior to this Court's decision in *Gant*, so review of this rule, uninhibited by any good-faith exception, would not have been precluded or even significantly impaired.

This Court rarely creates a rule of law out of blue sky that has never been accepted by any other court. Recent decisions of this Court expanding the substantive reach of the Fourth Amendment have been presaged by decisions of lower courts, see, *e.g.*, *Wilson* v. *Arkansas*, 514 U. S. 927, 930, n. 1 (1995) (knock-and-announce), even when the bulk of authority was to the contrary. *See Kyllo* v. *United States*, 533 U. S. 27, 46, n. 4 (2001) (Stevens, J., dissenting) (thermal imaging, five circuits upheld but one Tenth Circuit opinion *contra*, although later vacated and decided on other grounds); see also Pet. for Cert. in *Kyllo* v. *United States*, No. 99-8508, pp. 6-7 (citing three contrary state decisions); Brief in Opposition in *Kyllo* v. *United States*, No. 99-8508, pp. 9-10 (conceding one of these decisions rests solely on federal law and one other "went on to find" a federal Fourth Amendment violation after deciding primarily on the state constitution). Indeed, this Court sometimes intentionally refrains from deciding an issue while the opinions of other courts accumulate, in order to better illuminate the subject. *See Brown* v. *Texas*, 522 U. S. 940, 943 (1997) (opinion of Stevens, J., respecting denial of certiorari); *Johnson* v. *Texas*, 509 U. S. 350, 379 (1993) (O'Connor, J., dissenting) (" 'percolate' "). Where the determination of the substantive rule of law turns on interpretation of one of this Court's precedents, the exception would not apply in a jurisdiction that has taken the narrower interpretation and, importantly, it would not apply in

a jurisdiction that has not yet squarely addressed the question.

The claim that good-faith reliance on clear circuit precedent (or state precedent) will cripple this Court's trail-blazing function in Fourth Amendment law is an unfounded fear. The proposed exclusionary rule exception only applies when and where the prior law is "well-settled" in favor of the legality of the search. *See Davis*, 598 F. 3d, at 1264. Given 64 jurisdictions, it is extremely unlikely that an incorrect interpretation of a precedent of this Court would be clearly established law in all of them. Even the predominant of two arguably correct interpretations is highly unlikely to be universal, as *Gant* illustrates.

B. Lawyer Creativity

Petitioner's argument paints a picture of a compliant criminal defense bar, meekly throwing in the towel and not even arguing a point if contrary precedent would deny an exclusionary remedy under a good-faith exception. "If the good-faith exception applied when an officer relies on clear circuit precedent, defendants would have no incentive to argue for a change in the law." Brief for Petitioner 32. Many of us who regularly cross swords with the defense bar do not recognize the lawyer in this portrait.

Experience with the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), refutes the "no incentive to argue" argument. The line separating new rules from new applications of existing rules is rarely a bright one. Lawyers for habeas petitioners continued to argue that the rules they proffered were not really new, even after *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), raised the bar to a daunting height. Looking back through the cases, we see that disagreement within this Court as to whether the rule was truly new was the norm, and

agreement was very much the exception. See, *e.g.*, *Sawyer* v. *Smith*, 497 U. S. 227 (1990) (5-4); *Stringer* v. *Black*, 503 U. S. 222 (1992) (6-3); *Graham* v. *Collins*, 506 U. S. 461 (1993) (5-4); *Gray* v. *Netherland*, 518 U. S. 152 (1996) (5-4); *Lambrix* v. *Singletary*, 520 U. S. 518 (1997) (5-4); *O'Dell* v. *Netherland*, 521 U. S. 151 (1997) (5-4); *Beard* v. *Banks*, 542 U. S. 406 (2004) (5-4).

Experience with the qualified immunity rule is similar. The boundaries of what is "clearly established" are not clearly established. In *Wilson* v. *Layne*, 526 U. S. 603 (1999), the Wilsons brought their suit and claimed that the right they asserted was clearly established despite a lack of on-point precedent. They prevailed in the District Court, and their position received the support of five judges of the Court of Appeals, see *id.*, at 608, as well as one Justice of this Court. See *id.*, at 618-619 (Stevens, J., concurring in part and dissenting in part). Meanwhile, back in the West, another circuit had decided that the rule was indeed clearly established. See *id.*, at 608; see also *Hanlon* v. *Berger*, 526 U. S. 808, 810 (1999) (reversing the latter judgment).

Sometimes a litigant argues a position based on a clearly established rule of law. Occasionally, a litigant argues for changing a rule of law that is clearly established contrary to his position. Then there is the great gray mass in the middle where the state of current law is debatable. The exception at issue in this case is, in a sense, the opposite of the rules concerning clearly established law that operate under the retroactivity rule of *Teague* v. *Lane*, the law of qualified immunity, or the relitigation bar of 28 U. S. C. §2254(d). For all of those rules, when reasonable minds may differ the doubt is resolved in favor of the state court judgment or the police officer. See *Butler*, 494 U. S., at 415; *Wilson*, 526 U. S., at 614-615; *Berghuis* v. *Smith*, 559 U. S. __, 130

S. Ct. 1382, 1395, 176 L. Ed. 2d 249, 262-263 (2010) (lack of clearly established precedent supporting Smith's claim was enough to reject it). "[A]n undeveloped state of the law," see *Wilson*, *supra*, at 617, results in a judgment for the state or its officers under these rules. For the rule at issue in this case, an undeveloped state of the law results in a decision in favor of exclusion. The great gray mass in the middle is effectively on the other side.

Given that these much more severe limitations on remedies have not shut off the flow of creative legal arguments, it defies belief that the modest limitation at issue in this case would. As with these other doctrines, lawyers will continue to argue that the rule they seek is not really new. That argument will succeed far more often, because the burden of establishing that the rule is "clearly established" is on the other side. Even when the argument does not succeed, a decision making new law may be rendered in the process. See *Wilson*, 526 U. S., at 614.[5]

Even when a party does not argue to make new law, that argument may be made by *amici*. See *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (Fourth Amendment exclusionary rule proposed by *amicus*); *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (plurality opinion) (nonretroactivity of proposed Sixth Amendment rule argued by *amicus*). An *amicus* who argues for the overruling of a case that the party argues is distinguishable has departed much less from the question presented than the arguments this Court accepted in *Mapp* or *Teague*. For example, a defendant could come to this Court with a claim that a "stop and frisk" was not supported by the reasonable suspicion required by

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5 The argument that Article III precludes rulemaking without remedy is addressed in Part III, *infra*.

existing precedent, see *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000), and an *amicus* could call for raising the standard to a higher level.

Does this Court need to be concerned with the scenario of overruling a precedent of its own with such crisp boundaries that no case can come to this Court with both a credible claim it is distinguishable and an alternative challenge to the precedent itself? Looking back over 21 years of *Teague* cases in this Court, we only see one where the newness of the rule was clear beyond dispute. In *Walton* v. *Arizona*, 497 U. S. 639, 649 (1990), this Court affirmed the constitutionality of the Arizona statute requiring the trial judge to find the eligibility circumstances in capital cases, rejecting the Sixth Amendment holding of *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1023-1029 (CA9 1988). See *Walton*, *supra*, at 647 (certiorari granted to resolve conflict with *Adamson*). Twelve years later, the Court overruled *Walton* and struck down the same statute on the same theory as *Adamson* in *Ring* v. *Arizona*, 536 U. S. 584, 588-589 (2002). When the *Teague* question arrived in this Court, there was no dispute that *Ring* was new, and the only question was whether an exception applied. See *Schriro* v. *Summerlin*, 542 U. S. 348, 352-353 (2004).

Ring involved a binary choice of factfinder, judge or jury, rather than the shades-of-gray type of choice typically encountered in Fourth Amendment cases. See *Illinois* v. *Gates*, 462 U. S. 213, 238-239 (1983) (rejecting rigid test and adopting a totality of circumstances analysis). This scenario, rare enough in other aspects of criminal procedure, is even less likely to arise in the Fourth Amendment area. Even if it is a theoretical possibility, is it sufficient to impose the unjust exclusionary rule on a whole class of cases where it serves neither a truth-finding nor a deterrent function?

Such a remote possibility is too slender a reed to support the drastic remedy of exclusion of valid, probative evidence. When the scarcity of precedents fitting this description is combined with diversity of courts discussed in Part II-A, above, the possibility becomes vanishingly small. Even when this Court's precedents do establish clear, discrete rules in favor of the government, it is not unheard of for at least one state or circuit to go the other way, particularly if later cases had dropped hints that an overruling was in the cards. In *Simmons* v. *Roper*, 112 S. W. 3d 397, 399-400 (Mo. 2003), for example, the Supreme Court of Missouri ruled contrary to an unmistakably clear precedent of this Court, jumping the gun on the actual overruling. This Court granted certiorari and affirmed without a trace of disapproval. *See Roper* v. *Simmons*, 543 U. S. 551 (2005); cf. *Agostini* v. *Felton*, 521 U. S. 203, 237-238 (1997) (lower courts should follow Supreme Court precedent on point until expressly overruled by this Court).

Even if the proposed good-faith exception on the exclusionary remedy prevented making new law in a case where exclusion would not result, there would still be more than enough vehicles for future shaping of Fourth Amendment law. However, this prerequisite to petitioner's argument is not true, weakening it even further.

III. The limits of the judicial power do not prevent deciding whether a right has been violated first and whether the remedy is available afterward.

Petitioner maintains that Article III forbids deciding "questions of law when [the court's] decision would not have any actual impact on the case before it or on any

other case," equating "actual impact" with granting relief. See Brief for Petitioner 22.[6] If that were correct, courts would always have to decide the "remedy" question before the "right" question, because questions regarding the limits of the judicial power are jurisdictional and must "be established as a threshold matter . . . ." *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998).

We will begin, therefore, with an examination of cases deciding whether there is what Justice Breyer called a "rigid 'order of battle,' " see *Morse* v. *Frederick*, 551 U. S. 393, 430 (2007) (opinion concurring in the judgment in part and dissenting in part), and show that this Court has largely rejected the notion of any such requirement in situations equivalent to the present case.

A. Rights, Remedies, and Order of Battle

The two-prong test of *Strickland* v. *Washington*, 466 U. S. 668 (1984), may be seen as a right-remedy rule. Every criminal defendant, except for petty offenses, has a right to an effective attorney. See *id.*, at 685-686. However, the unique and drastic remedy of reversing one party's judgment for the shortcomings of the other party's attorney is only granted where there is a showing of prejudice significantly greater than the harmless error test applicable to most trial errors. See *id.*, at 693-694. These issues may be decided in either order.

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6 On its face, this statement seems to imply that a case not otherwise within the judicial power to decide could be brought within it by virtue of its impact on other cases. However, nothing in petitioner's argument supports such a remarkable proposition, and one of the cases he quotes directly contradicts it, see Brief for Petitioner 23 (quoting *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943)), so we will not address it further.

Id., at 697. Therefore, a court may make a precedent on what constitutes deficient performance even though the decision ultimately does not "have any actual impact on the case before it" because the defendant has not made a showing of prejudice sufficient to set aside his conviction.

In habeas corpus, the question of whether the petitioner has forfeited his claim to the remedy through procedural default is normally answered before addressing whether his rights were violated. However, this order is not strictly required. See *Lambrix* v. *Singletary*, 520 U. S. 518, 524-525 (1997) (default normally decided before *Teague*, which precedes merits, but order not mandatory); cf. *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992) (default issue is jurisdictional on direct review of state judgment in this Court). If the claim is defaulted, and no exception applies, a decision on whether a right was violated will have no impact. Yet habeas courts are not rigidly precluded from deciding the substantive question first.

The qualified immunity cases are closely analogous to the present case in this regard. In *Wilson* v. *Layne*, 526 U. S. 603 (1999), this Court did what petitioner claims Article III forbids. It resolved the substantive Fourth Amendment question in the Wilsons' favor, establishing a precedent, see *id.*, at 614, and then it denied them any remedy. See *id.*, at 617-618. Indeed, for a period of eight years, this Court *required* this order of decision in qualified immunity cases. See *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001), overruled on this point in *Pearson* v. *Callahan*, 555 U. S. 223, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 576 (2009). Promoting development of the law was the reason. See *id.*, at 201. Before it was required, this order of decision was considered the better practice. See *County of Sacramento* v. *Lewis*, 523 U. S. 833, 841, n. 5 (1998). Present

doctrine recognizes that development of the law is an important consideration in deciding whether to decide on the right before the remedy, but whether development will actually be fostered varies from case to case, and other considerations are also significant. See *Pearson*, *supra*, 129 S. Ct., at 818-821, 172 L. Ed. 2d, at 576-580.

Conspicuously absent from *Pearson*'s extended discussion is any suggestion that deciding whether a right has been violated before deciding whether the complaining party is entitled to the remedy creates any problems under Article III. The problem is approached entirely as one of policy, not constitutional mandate. If there had been an Article III problem, the *Pearson* Court would have prescribed the opposite order of decision, rather than leaving the matter to the discretion of the court hearing the case. Cf. *id.*, 129 S. Ct., at 818, 172 L. Ed. 2d, at 576 (discretionary). Similarly, in *Morse* v. *Frederick*, even while Justice Breyer protested that the Court should decide only the qualified immunity question in that case, 551 U. S., at 425, 428-432, he did not suggest that the Constitution required this procedure or that it should be followed in every case. Quite the opposite, "In some instances, it is appropriate to decide a constitutional issue in order to provide 'guidance' for the future." *Id.*, at 428; see also *id.*, at 431-432.

Even closer to the present case is the warrant good-faith case, *United States* v. *Leon*, 468 U. S. 897 (1984). Justice White's opinion for the Court addressed and rejected an argument very similar to the one petitioner makes in the present case. See *id.*, at 924. On the "order of battle" point, the *Leon* Court said, "If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing

courts from deciding that question before turning to the good faith issue." *Id.*, at 925.

That leaves only *Teague* v. *Lane*, 489 U. S. 288, 316 (1989) (plurality opinion), as saying that a court cannot decide the question of substantive law in a party's favor while also deciding he is not entitled to the remedy he seeks or perhaps any remedy at all. The rationale given by the *Teague* plurality for its threshold question requirement was avoidance of advisory opinions, see 489 U. S., at 316, but that rationale cannot be reconciled with the contrary practice in the qualified immunity cases or *Leon*. The correct rationale for the rule must lie in the policy considerations that apply to *Teague* and not to these other areas.

From the time it was proposed to the present day, the rule we now call *Teague* has been a policy-based limitation, grounded on "the purposes for which the writ of habeas corpus is made available." See *Mackey* v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in part and dissenting in part); *Danforth* v. *Minnesota*, 552 U. S. 264, 278 (2008). In the context of federal habeas review of state judgments, *Teague*'s threshold question rule served the important policy of at least partially restraining the lower federal courts from doing indirectly what they had no authority to do directly—establishing precedents that were binding *de facto* on state courts, even though the state courts had no *stare decisis* obligation to follow them. See *supra*, at 10. Congress endorsed this policy decision when it enacted the largely overlapping rule of 28 U. S. C. § 2254(d)(1) and expressly provided that only Supreme Court precedent made a rule of federal law "clearly established" for the purpose of collateral attack on a state criminal judgment in federal court.

The threshold question rule of *Teague* can be examined in more depth if and when a case ever arises

that requires it.[7] For now, it is sufficient to note that the rule is unique to the habeas context and not an expression of a broader principle that applies in other contexts.

In general, when both a violation of a right and an entitlement to a remedy are at issue, courts may address the questions in either order, and they may address both or stop at one if one is sufficient to conclude the case. That rule, combined with *Steel Co.*'s rule that jurisdictional Article III requirements must be addressed at the threshold, necessarily implies that entitlement to the remedy is not essential for the case to come within the judicial power under Article III.

B. Standing

Petitioner contends, "The good-faith exception would deny the Court the power to redress the defendant's injury, eliminating Article III standing to adjudicate the merits of the case." Brief for Petitioner 26. It appears that petitioner has confused the two different senses of the word "redressability."

Standing is explained in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U. S. 269, 273-274 (2008):

> "[I]n order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i.e.*, a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (*i.e.*, a '"fairly . . . trace[able]"' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is '"likely"' and not 'merely "speculative"' that the plaintiff's injury will

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7 So few claims are Teague-barred today that are not also barred by either 28 U. S. C. § 2254(d) or the procedural default rule that it may never be necessary to examine the question.

be remedied by the relief plaintiff seeks in bringing suit). *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (calling these the 'irreducible constitutional minimum' requirements)."

Importantly, *Sprint* referred to the remedy plaintiff seeks, not the remedy plaintiff is entitled to. That is the critical distinction in the "redressability" element illuminated by *Steel Co.*, particularly in its discussion of *Bell* v. *Hood*, 327 U. S. 678 (1946). In *Bell*, the *Steel Co.* Court tells us,

> "This Court held that the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal. Thus, the uncertainty about 'whether the plaintiff's injuries can be redressed' to which [the *Steel Co.* dissent] refers is simply the uncertainty about whether a cause of action existed—which is precisely what *Bell* holds *not* to be an Article III 'redressability' question. It would have been a different matter if the relief *requested* by the plaintiffs in *Bell* (money damages) would not have remedied their injury in fact; but it of course would." 523 U. S., at 96 (emphasis in original).

The environmental group's complaint in *Steel Co.* failed the redressability element not because it was not legally entitled to any of the remedies it sought but because none "would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent." 523 U. S., at 105-106.

In a criminal case, the defendant always has standing in the broadest sense of a personal stake in the outcome of the case. See *Leon*, 468 U. S., at 924 ("undoubtedly raise live controversies"). In the more particular terms of the "triad of injury in fact, causation, and redressability," *Steel Co.*, 523 U. S., at 103,

the first two are satisfied in a Fourth Amendment case by a breach of the defendant's Fourth Amendment rights, not someone else's, by the police. See *Alderman* v. *United States*, 394 U. S. 165, 174 (1969). That leaves redressability.

In terms of remedy, the Fourth Amendment is fundamentally different from constitutional provisions protecting trial rights, such as the Self-Incrimination Clause of the Fifth Amendment or the Confrontation Clause of the Sixth Amendment. For those clauses, exclusion of the evidence at trial prevents the constitutional violation, regardless of what transpired before. An unlawful search violation, on the other hand, is complete when the search is made and cannot be undone. See *Withrow* v. *Williams*, 507 U. S. 680, 691 (1993).

The traditional remedy for harms that cannot be prevented or undone is money damages, and that was the understood remedy for illegal search or seizure when the Fourth Amendment was ratified. See Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 774 (1994). Exclusion of evidence in a criminal case is an odd remedy, and if it were subjected *de novo* to the kind of scrutiny that the requested remedies were given in *Steel Co.*, it might fail the test. Exclusion of evidence does not prevent the violation, it does not undo the violation, and it is not compensation in any kind of proportion to the harm caused by the violation. However, that would be an argument against the exclusionary rule in general, not the exception at issue in this case. For the purpose of this case, we must accept the premise of long-established precedent that exclusion of evidence is an acceptable form of redress, *i.e.*, "that the requested relief will [if granted] redress the alleged injury." *Steel Co.*, 523 U. S., at 103.

Petitioner's standing argument, then, comes down to an assertion that a litigant lacks standing when the remedy he seeks would be redress for a wrong he personally suffered but the law precludes him from receiving that remedy, *i.e.*, he has "no prospect for success." Brief for Petitioner 26. That is precisely the view of redressability that *Steel Co.* rejected. See 523 U. S., at 96. Whether the remedy a party requests constitutes redress goes to standing, but whether the party is legally entitled to that remedy goes to the merits of case.

There is no standing problem in the present case.

C. Remedies and Retroactivity.

In Part I-C of his brief, petitioner contends that the exclusionary rule exception in this case harkens back to the discredited retroactivity regime of *Linkletter* v. *Walker*, 381 U. S. 618 (1965), and in Part II-A, he contends that the exception violates the prohibition on purely prospective decision-making in *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86 (1993). See Brief for Petitioner 16-25. Actually, it is just the opposite. The right-remedy distinction of this exception is fully consistent with the jurisprudence that replaced *Linkletter* in *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), *Teague*, and *Harper*. We address the first argument in this part and the second argument in the next part.

The problems with the *Linkletter* approach are described in the oft-cited separate opinion of Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667 (1971).[8] One problem was the inconsistency arising from deciding retroactivity rule-by-rule based on policy judgments about the purpose of the individual rule. As

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8. All *Mackey* cites in this brief are to Justice Harlan's opinion.

a result, "the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." *Id.*, at 676.

A second problem was the arbitrariness and incompatibility with the judicial function of granting relief in the case that made the rule but denying it other cases similarly situated. *Id.*, at 678-679. Ernesto Miranda received a second trial, and the woman he raped was forced to endure that ordeal a second time, see *State* v. *Miranda*, 104 Ariz. 174, 450 P. 2d 364 (1969), but no retrial was required for similarly situated murderers and rapists. See *Johnson* v. *New Jersey*, 384 U. S. 719, 721 (1966). "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review." *Mackey*, 401 U. S., at 679.

A third problem is the anomaly of reversing a lower court that comes to the same conclusion that the Supreme Court ultimately reaches, but in one of the cases that is not fished from the stream. See *id.*, at 680. A fourth was the reduced incentive to bring novel arguments to this Court, see *ibid.*, and a fifth was a perceived detrimental effect on *stare decisis*. See *id.*, at 680-681.

Justice Harlan's proposal was to replace retroactivity with a focus on remedies. This Court's "duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." *Id.*, at 681. It does not follow, however, that the drastic remedy of collateral attack on a final judgment must be extended to every

case where the interpretation at the time of the attack is different than it was at the time of the direct appeal. The interest in finality warrants strict limits on that remedy, see *id.*, at 683, and one appropriate limit is to only redress procedural errors that were seen as errors at the time the conviction became final. See *id.*, at 692. This is, with some modifications, current law under *Griffith* and *Teague*.

This doctrine corrects the main problems Justice Harlan saw with *Linkletter*. No longer is "retroactivity" the result of a policy-based decision made rule-by-rule. All new constitutional rules of criminal procedure apply on direct review. Habeas corpus may be used to remedy errors of substantive law that were not seen as errors at the time of the appeal, *Schriro* v. *Summerlin*, 542 U. S. 348, 351-352 (2004), but that remedy does not lie for subsequently recognized rules of procedure.[9]

No cases are fished from the stream for disparate treatment. All cases on direct review are treated alike. All cases on habeas corpus are treated alike. Habeas petitioners are treated differently from direct appellants, but they are seeking different remedies and not similarly situated. A lower court that decides a case in either of those contexts will be affirmed if it reaches the same conclusion that this Court ultimately reaches.

All of these salutary results would also be obtained with the rule under consideration in this case. The availability of the exclusion remedy would be based not

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9 Justice Harlan, *Mackey*, 401 U. S., at 693-694, and *Teague*, 489 U. S., at 311-314, recognized an exception for procedural changes of the magnitude of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), but this Court has never found such a rule in the 22 years since *Teague* and has recognized the unlikelihood that it ever will. See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001). It would be better to officially pronounce this never-used exception obsolete and retired.

on a nebulous policy decision but on the clarity of the prior law in the jurisdiction in question. A search in a jurisdiction where it was clearly authorized at the time is not the same as a search in a jurisdiction where the case law said it was forbidden at the time, so it is not arbitrary to treat them differently. That treatment will be the same all the way up the appellate chain in a given case, so this Court and lower courts will be deciding on the same basis.

Only when we get down to Justice Harlan's final make-weight arguments (arguments not mentioned when the Court accepted his view in *Griffith*, 479 U. S., at 322-323), do we see even a hint of the problems that existed under the *Linkletter* regime. Even there, it is only a hint. As we showed in Part I, *supra*, the flow of Fourth Amendment cases to this Court's door may be reduced a bit by the rule under consideration, but it will not be cut off by any means. The impact on *stare decisis* is similarly minimal.

In *Danforth* v. *Minnesota*, 552 U. S. 264, 271, and n. 5 (2008), this Court recognized anew what Justice Harlan said from the beginning, that the *Teague* rule is about remedies and not "retroactivity" as such.[10] So it is in this case. What the Court of Appeals decided was not to disregard current law and apply since-discarded precedent. That would be "nonretroactivity." Instead, the Court of Appeals applied current substantive Fourth Amendment law to recognize a violation but then applied a rule of remedies law to decide that the remedy requested in this case is not available to redress that violation, given the state of the law at the time of the search. *See Davis*, 598 F. 3d, at 1263, 1268. That

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10 *Danforth*'s use of the word "redressability," though, creates potential for confusion with the use of that word in a different sense in the law of standing. *See supra*, at 23.

is what this Court has done for many years in qualified immunity cases, see *supra*, at 19, and it is consistent with the law of retroactivity under *Griffith* and *Teague*.

D. Prospective Decisionmaking.

Petitioner contends that the rule applied by the Court of Appeals in this case would require courts to engage in constitutionally forbidden prospective decisionmaking, citing Justice Scalia's concurrence in *Harper*. See Brief for Petitioner 23. With the above discussion of the distinction between retroactivity and remedy limitations in mind, we can see that *Harper* holds exactly the opposite.

Harper involved a state income tax law that exempted retirement benefits paid to state but not federal employees, a practice held unconstitutional in *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 817 (1989). See *Harper*, 509 U. S., at 89-90. Applying *Griffith* to civil cases, *Harper* decided that the rule of *Davis* must be applied in *Harper* and any other case pending on direct review. See *id.*, at 95-97.

However, the Court expressly refrained from deciding that Harper was entitled to the remedy he sought or any remedy still available to him. See 509 U. S., at 100. On remedy, *Harper*, *supra*, at 100-102, relied on *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18 (1990). *McKesson* held, "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id.*, at 38, n. 21. Thus while the Virginia courts were required to apply the substantive rule of *Davis* retroactively, that application would not necessarily result in the remedy plaintiffs sought, and the case was

remanded to make that determination. *Harper*, *supra*, at 99, 102.

Limits on remedies were distinguished from retroactivity in the next major case to apply *Harper*, *Reynoldsville Casket Co.* v. *Hyde*, 514 U. S. 749, 757-758 (1995). The plaintiff pointed to the qualified immunity cases as an example of permitted nonretroactivity based on reliance. The Court acknowledged that the qualified immunity doctrine can result in a denial of a remedy in the event of a change in the law, just as nonretroactivity would. However, qualified immunity remains a "separate legal ground," not a doctrine of retroactivity, based on "special federal policy considerations." *Id.*, at 757-758.

> "The upshot is that Hyde shows, through her examples, the unsurprising fact that, as courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, *does not determine the outcome of the case*. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of 'finality' present in the *Teague* context, that limits the principle of retroactivity itself." *Id.*, at 758-759 (first emphasis added).

Hyde thus rejects the notion that a new rule must "determine the outcome of the case" to avoid the prohibition on prospectivity. Nonretroactivity and a limit on remedies may lead to the same result in the case before the court or even in all cases within a

certain time frame, but that does not make them equivalent. As long as the court applies the new rule to the question of substantive law before it, it has not engaged in forbidden prospectivity, even if some other limit on remedies ultimately denies the remedy to the party who prevails on the substantive point.

The application of the exclusionary rule is not needed in this case for deterrence, the sole reason given for the rule by this Court in many cases over the years. It is not needed as a practical matter to maintain the development of Fourth Amendment law, as explained in Part II. It is not needed as a theoretical matter to avoid problems of standing and prospectivity, as explained in this Part.

At best, the exclusionary rule is a necessary evil. Where it is not necessary, it is just plain evil.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

February, 2011

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 09-11328

In The
Supreme Court of the United States

WILLIE GENE DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari To The United States
Court of Appeals For The Eleventh Circuit

BRIEF OF THE STATES OF MARYLAND, ALASKA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, IDAHO, HAWAII, ILLINOIS, INDIANA, KENTUCKY, MAINE, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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INTEREST OF AMICI

This case concerns whether evidence is admissible under the good-faith exception to the exclusionary rule when that evidence was obtained during a search that was conducted in objectively reasonable reliance on precedent that is subsequently overruled. The Amici States have a substantial interest in this question because, for nearly 30 years, courts and police officers in the field relied on the bright-line rule of *New York v. Belton*, 453 U.S. 454 (1981). When this Court issued its opinion in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), substantially limiting the circumstances under which law enforcement officers could search a suspect's car incident to arrest, there were hundreds of cases in state courts either pending trial or on direct appeal where the police had obtained evidence during a search conducted in reliance on the *Belton* rule. The Amici States have an interest in ensuring that the evidence recovered in those cases is admissible, and that any search conducted in reasonable reliance on well-settled case law is subject to the good-faith exception.

SUMMARY OF ARGUMENT

This case is not about the law of retroactivity. When the Eleventh Circuit applied the substantive rule announced in *Gant* to the facts of this case, it fully complied with the law of retroactivity. The proper focus of this case, and, indeed, the only question upon which this Court granted certiorari, is whether the exclusionary rule applies. The lower court's opinion does not, as Petitioner contends, "reopen the Pandora's Box of retroactivity." (Brief of Petitioner at 20).

The issue in this case should be decided by reference to the purposes of the exclusionary rule. This Court has said that exclusion should be a "last resort," not a "first impulse," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), and must be applied only where the likelihood of deterrence outweighs the societal costs. *See, e.g. Herring v. United States*, 129 S. Ct. 695, 700-01 (2009).

As this Court recognized in establishing the good-faith exception, the exclusionary rule is not intended to deter objectively reasonable law enforcement activity. *United States v. Leon*, 468 U.S. 897, 919 (1984). The same rationale applies here. For 28 years, the holding in *Belton* was considered hornbook law and was relied upon by police officers nationwide. When officers act within the confines of the law, the exclusion of evidence satisfies none of the purposes of the exclusionary rule, yet exacts substantial societal costs, including allowing guilty defendants to go free and potentially undermining confidence in the criminal justice system. In those circumstances, this Court has made clear that the exclusionary rule should not apply.

ARGUMENT

I

NOTHING IN THIS COURT'S RETROACTIVITY JURISPRUDENCE PREVENTS THE APPLICATION OF THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE WHEN POLICE ACT IN RELIANCE ON WELL-SETTLED PRECEDENT.

This case is about the proper application of the exclusionary rule. The law of retroactivity is not at issue here. There is no doubt that the law announced in *Gant* is to be applied to all cases on direct appeal at the time *Gant* was decided, and was properly applied by the lower court in this case. *United States v. Davis*, 598 F.3d 1259, 1263 (11th Cir. 2010) ("There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*.").

Whether exclusion of the evidence is an appropriate sanction for that violation, however, is a separate issue and has been for over 25 years. *See, e.g. Leon*, 468 U.S. at 906 (whether exclusion is an appropriate sanction is an issue separate from whether a Fourth Amendment violation occurred). Nevertheless, Petitioner argues that the Government's position reopens the "Pandora's box" of retroactivity law rejected by this Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987). (Brief of Petitioner at 20). This logic is flawed because it fundamentally conflates the question of retroactivity with the remedy of exclusion.

A. Whether the exclusionary rule applies in this case is not a question of retroactivity.

Prior to 1982, this Court decided retroactivity applying the three factor balancing test announced in *Linkletter v. Walker*, 381 U.S. 618 (1965). When applying this test to Fourth Amendment cases, the Court viewed the substantive rule and the exclusion remedy as one and the same. *Desist v. United States*, 394 U.S. 244, 249 (1969); *Linkletter*, 381 U.S. at 636-37.

The Court's view of the exclusionary rule changed, however, during the years that the *Linkletter* doctrine was in effect. By the time the *Linkletter* balancing test was replaced by the bright-line rule of *Griffith*, this Court no longer considered exclusion the inevitable result of a Fourth Amendment violation. *See Leon*, 468 U.S. at 905-06 (noting that while the Court's language has "sometimes implied that the exclusionary rule is a necessary corollary to the Fourth Amendment[,]" the Constitution has never been interpreted to require the exclusion of illegally seized evidence under all circumstances). Instead, the Court concluded that the remedy of exclusion is warranted only if the potential for deterrence of unlawful police conduct outweighs the societal costs exacted by exclusion. *Leon*, 468 U.S. at 907-13. Because the application of the judicially created remedy of exclusion is now properly viewed as a question separate from the application of the new constitutional rule, the issue is no longer one of retroactivity.

The Court began to separate the two issues in *United States v. Peltier*, 422 U.S. 531 (1975), when it

viewed the applicability of the remedy of exclusion as a question separate from the constitutionality of the search.[1] In *Peltier*, the Court considered whether to apply its holding in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), retroactively. The Court first observed that, "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule . . . the Court has concluded that any such new constitutional principle would be accorded prospective application." *Peltier*, 422 U.S. at 535 (footnote omitted). This, the Court said, speaks to "the nature of the exclusionary rule," as well as to "the nature of retroactivity analysis." *Id.* at 536.

While recognizing the "imperative of judicial integrity," the Court noted that it has always "principally" considered the deterrent purpose served by the exclusionary rule when analyzing retroactivity. *Id.* The Court concluded that the "teaching of these retroactivity cases" is that "the introduction of evidence which had been seized by law enforcement officers in good-faith compliance with then-prevailing constitutional norms" does not offend the notion of judicial integrity. *Id.* at 536-37. The focus in the retroactivity cases on deterrence, the Court found, is "quite in harmony with the approach taken generally

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[1] As one commentator has noted, *Peltier* is remarkable because it marked the first time that the Court "recognized the distinction between right and remedy and held that even if the defendant's fourth amendment rights had been violated by the search, the remedy provided by the exclusionary rule would not necessarily be granted." *Retroactivity and the Exclusionary Rule: A Unifying Approach*, 97 Harv. L. Rev. 961, 964 (1984).

to the exclusionary rule[.]" *Id.* at 538-39. The Court cited *United States v. Calandra*, 414 U.S. 338, 348 (1974), for the notion that the exclusionary rule will only be applied in those situations "where its remedial objectives are thought most efficaciously served." *Peltier*, 422 U.S. at 538-39.

Turning to the facts in *Peltier*, 422 U.S. at 541-42, the Court found that searches similar to the one deemed unconstitutional in *Almeida-Sanchez* had been "consistently approved by the judiciary" and that the search of Peltier's car was done in reliance upon these cases. Thus, excluding the evidence recovered from such a search would not deter unlawful police conduct, and since deterrence was the primary purpose of the new rule, it should not be applied retroactively. *Id.*

In so holding, the Court spoke of the appropriateness of exclusion as a question distinct from the existence of a Fourth Amendment violation. *Id.* at 542. The Court first noted that, if deterrence is the purpose of the exclusionary rule, evidence should be suppressed only where the law enforcement officer knew or should have known that the search was unconstitutional. *Id.* The Court went on to acknowledge that it had overturned the federal judiciary's uniform acceptance of roving border patrol searches in *Almeida-Sanchez*, but said that

> in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment

> rights were violated by the search of his car.

Id. (footnote omitted).

Further, the Court responded to Justice Brennan's criticism – that, under the Court's reasoning, the evidence in Almeida-Sanchez's trial should not have been excluded – by noting that the Government did not urge "any considerations of exclusionary rule policy independent of the merits of the Fourth Amendment question[.]" *Id.* at 542 n.12. Thus, while *Peltier* framed the issue as one of retroactivity, at bottom, the question the Court grappled with is nearly identical to the one presented here: whether the purpose of the exclusionary rule is served by excluding evidence obtained by law enforcement officers acting in reasonable reliance on well-settled precedent. Even though *Peltier* predated the adoption of the good-faith exception, its reasoning is consistent with *Leon* and its progeny.

Indeed, when this Court created the good-faith exception in *Leon*, it found the analysis of the early Fourth Amendment retroactivity cases, including *Peltier*, to be persuasive. *Leon*, 468 U.S. at 909, 912-13, 918-19. The Court opined that the "balancing approach that has evolved during the years of experience with the [exclusionary] rule provides strong support for the modification currently urged upon us." *Id.* at 913. When considering whether the deterrent purpose of the exclusionary rule was served under the facts of *Leon*, the Court quoted the discussion of the deterrent purpose in *Peltier*, and concluded that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 919.

B. The bright-line retroactivity rule adopted in *Griffith* does not undermine the analysis in *Peltier* and *Leon*.

Three years after *Leon*, in *Griffith*, the Court denounced the three-factor *Linkletter* retroactivity test in favor of a bright-line rule that cases announcing a new constitutional principle apply to all cases on direct review at the time the decision is rendered. 479 U.S. at 328. Although Petitioner characterizes *Griffith* as holding "that the exclusionary rule is available to all cases on direct review whether or not the new decision is a clear break [from precedent.]" (Brief of Petitioner at 19), in fact the exclusionary rule was entirely irrelevant to the decision in *Griffith*. The issue in that case was whether the new procedural rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied retroactively. 479 U.S. at 316. *Griffith* had nothing to do with the exclusionary rule, so the Court had no cause to address whether a change in retroactivity jurisprudence would affect the application of the exclusionary rule.

In fact, just two months after *Griffith*, this Court decided *Illinois v. Krull*, 480 U.S. 340, 347 (1987), and reiterated that the question of whether the Fourth Amendment was violated is separate from the question of whether exclusion of the evidence is an appropriate sanction for a violation. The Court also reaffirmed that the appropriate test for considering the applicability of the exclusionary rule is to consider "whether the rule's deterrent effect will be achieved," and then weigh "the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process." *Id.* at 347. The Court again made

clear that the exclusionary rule is applicable only when "its remedial purpose is effectively advanced." *Id.* at 347.

Moreover, the Court was unpersuaded by the dissent's criticism that the *Krull* decision was "at right angles," if not "directly at odds," with the rule announced in *Griffith*. *Id.* at 368 (O'Connor, J., dissenting). Likewise, the Court rejected the dissent's argument that the application of a good-faith exception undermined the "basic norms of constitutional adjudication" because the party complaining of the substantive violation did not receive the remedy of exclusion. *Id.* Instead, the Court followed *Leon*, and weighed the likelihood of deterrence against the "substantial societal costs exacted by the exclusionary rule." *Id.* at 352-53 (quoting *Leon*, 468 U.S. at 907).

The transformation in the way this Court has analyzed Fourth Amendment violations and the application of the exclusionary rule was also recognized by this Court in *Arizona v. Evans*, 514 U.S. 1, 13 (1995). Addressing Evans's argument that *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971), compelled exclusion of the evidence in his case, Justice Scalia noted that the *Whiteley* Court found that a Fourth Amendment violation had occurred, then summarily concluded that because Whiteley's constitutional rights had been violated, "the evidence secured as an incident thereto should have been excluded from his trial."[2] *Evans*, 514 U.S. at 13.

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[2] In *Whiteley*, 401 U.S. at 568, police arrested the defendant based upon a radio bulletin identifying two robbery suspects. The Court found that the facts underlying the radio report were insufficient to establish probable cause, and that, while the arresting officers were entitled to rely on the radio

Although *Whiteley* is still relevant precedent when analyzing Fourth Amendment claims, this Court observed that its "precedential value regarding application of the exclusionary rule is dubious," because it treated the identification of a constitutional violation as "synonymous with the application of the exclusionary rule." *Id.* The Court noted that "[s]ubsequent case law has rejected this reflexive application of the exclusionary rule." *Id.* The Court emphasized that in Fourth Amendment cases, the issue of exclusion is now separate from whether a constitutional violation occurred. *Id.*

C. None of the criticisms of the *Linkletter* doctrine apply to a good-faith exception to the exclusionary rule when officers rely on well-settled precedent.

Creating a good-faith exception under these circumstances would not implicate any of the concerns that caused this Court to abandon *Linkletter* in favor of the bright-line rule. In *Griffith*, this Court said that the "integrity of judicial review requires that [the Court] apply [the new rule] to all similar cases pending on direct review." 479 U.S. at 323. Amici agree. As noted above, the lower court already applied the new rule in *Gant* in finding that the search in this case was unconstitutional. The question before this Court is whether exclusion of the evidence recovered is an

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notification, an "otherwise illegal arrest cannot be insulated from challenge" because it was done in reliance upon a police-issued bulletin. *Id.*

appropriate sanction. Since this is a separate question from whether a constitutional violation occurred, refusal to apply the exclusionary rule does not offend the integrity of judicial review.

Neither does such an exception treat similarly situated defendants differently. As in *Almeida-Sanchez*, the Government in *Gant* did not argue that the exclusionary remedy was inapplicable, so the issue was not before this Court and *Gant* received the benefit of exclusion. In future cases, however, an argument can be made, and courts can consider, whether the good-faith exception would apply even in the case that announces the new rule.[3] There is no "actual inequity" because no one is a "chance beneficiary" of the windfall of exclusion. *Griffith*, 479 U.S. at 323 (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)).

Whether the exclusionary rule applies in this case must be answered by considering whether the deterrent effect of suppressing the evidence outweighs the societal costs of exclusion. The law of retroactivity is not implicated.

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[3] The ability of future defendants to argue against the applicability of the good-faith exception undermines Petitioner's contention that such an exception removes all incentive to argue for changes in the law. (Brief of Petitioner at 31-34). Just as in cases involving warrants, future defendants would litigate whether, given the facts of a particular case, the good-faith exception should apply.

II.

APPLYING THE EXCLUSIONARY RULE TO CASES WHEN POLICE RELY ON THE WELL-SETTLED *BELTON* RULE WILL NOT SATISFY THE DETERRENT PURPOSE OF THE RULE AND WILL EXACT SUBSTANTIAL SOCIETAL COSTS.

The exclusionary rule was never intended to be a personal constitutional right or remedy for the individual victim of an improper search or seizure. Application of the exclusionary rule in instances where evidence is seized in violation of the Fourth Amendment is neither an award for clever lawyering, nor is it an "incentive[] to bring Fourth Amendment challenges[,]" as argued by the Petitioner. (Brief of Petitioner at 37). Since the exclusionary rule's inception, its sole purpose has been deterrence.

If deterrence against unlawful government action is the purpose behind the exclusionary rule, then exclusion is not warranted if the government actor performs his or her duty in reasonable reliance on the law. This is the principle behind the good-faith exception established by this Court in *Leon*, and subsequently extended in its holdings in *Krull*, *Evans*, and *Herring*. The same rationale applies here: the exclusion of evidence recovered as a result of police officers' objectively reasonable reliance on the bright-line rule established in *Belton* offers no deterrent value against future Fourth Amendment violations and carries a heavy cost in the suppression of probative evidence of guilt.

A. The sole purpose of the application of the exclusionary rule for Fourth Amendment violations is to deter government misconduct.

This Court has consistently held that the exclusionary rule "is not an individual right and applies only where it result[s] in appreciable deterrence." *Herring*, 129 S.Ct. at 700 (internal quotations omitted). Exclusion has always been the Court's "last resort," not its "first impulse," *Hudson*, 547 U.S. at 591, and the Court's precedents establish "important principles that constrain application of the exclusionary rule." *Herring*, 129 S.Ct. at 700.

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim[.]" as the "ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Calandra*, 414 U.S. at 347 (quoting *Linkletter*, 381 U.S. at 637). This Court has explained that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]" and that "'[t]he rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (same).

B. The good-faith exception to the exclusionary rule was created because there is no deterrent value in applying the exclusionary rule when the police act in objectively reasonable reliance on the law in effect at the time.

In announcing the good-faith exception in *Leon*, the Court explained that "even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 918-19. Although this Court applied the good-faith exception in *Leon* to the act of police obtaining a search warrant from a magistrate and acting within the scope of the warrant, it did not limit the application of the exception to that circumstance exclusively.

Indeed, the *general* applicability of the good-faith exception discussed in *Leon* has been demonstrated by this Court's subsequent extensions of the good-faith exception in a number of different situations. In *Krull*, 480 U.S. at 356-57, the exception was applied to a police officer's reasonable reliance on a subsequently invalidated state statute. In *Evans*, 514 U.S. at 15-16, the good-faith exception was applied to an officer's reasonable reliance on clerical errors in a court database. Most recently, in *Herring*, 129 S. Ct. at 704, the good-faith exception was applied where the officer reasonably relied upon the report of an outstanding warrant based on erroneous police bookkeeping. Each

of these cases involved evidence seized by a police officer acting with a reasonable, good-faith belief that his or her actions complied with existing law.

When considering whether to apply the good-faith exception, *Leon* and its progeny have also assessed the degree of police misconduct at issue. Police violations that are not deliberate or reckless simply do not justify the application of the exclusionary rule. Citing the "flagrant" and "deliberate" police action in *Mapp*, where the officers forced their entry into the suspect's home with a false warrant, cuffed the suspect and excluded her lawyer, then canvassed the house for evidence, this Court recently explained that "since *Leon*, we have *never* applied the [exclusionary rule] to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this." *Herring*, 129 S.Ct. at 702 (emphasis added). This Court's post-*Leon* line of cases has consistently followed the general principles of both the exclusionary rule and the good-faith exception: where an officer's conduct is objectively reasonable, excluding the resulting evidence will not further the deterrent purpose of the exclusionary rule.

C. Because suppressing the evidence would provide no deterrent effect, the good-faith exception must be extended to officers who reasonably relied on the *Belton* rule.

In this case, there is no question that the officers' reliance on the bright-line *Belton* rule was objectively reasonable. Petitioner concedes as much. (Brief of Petitioner at 28). At the time of the traffic stop in this case, the *Belton* rule was as well settled as any

principle in Fourth Amendment jurisprudence, and indeed one of only a handful of bright-line rules in the whole of criminal procedure. In *Gant*, the Court acknowledged that the bright-line reading of *Belton* "has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years . . . ." 129 S. Ct. at 1722. The Court also noted that "[b]ecause a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding." *Id.* at 1722 n.11. Although the Court in *Gant* did not expressly overrule *Belton*, the practical reality is that *Gant* worked a sea change in the way police officers carried out a fundamental aspect of their job.

Some lower courts and Petitioner's amicus contend that police reliance on *Belton* was not objectively reasonable because the police "had been operating on thin ice for years." (Brief of the National Association of Federal Defenders as Amicus Curiae in support of Petitioner at 6.) But police officers are trained to follow the law, not predict its development. As this Court recognized in *Gant*, the bright-line reading of *Belton* was the law of the land and was relied on by the law enforcement community nationwide.

Even if this view of *Belton* as police "entitlement" was wrong, the police do not bear the blame for that widely accepted misreading. Indeed, it is precisely because the *Belton* rule was viewed as an entitlement that there can be no deterrence in suppressing evidence seized in reliance on it. Law review articles and concurring opinions may have provided for an interesting academic debate about the wisdom or the

continued vitality of the *Belton* bright-line rule, but such academic discussion should in no way diminish the reasonable objective reliance on the prevailing constitutional norm.

D. Failing to extend the good-faith exception to officers who reasonably rely on precedent will exact substantial societal costs.

While Petitioner identifies a number of policy considerations that he argues militate against creating a good-faith exception, he ignores the significant policy considerations in favor of implementing such an exception. This Court has long recognized the "substantial societal costs exacted by the exclusionary rule[.]" *Leon*, 468 U.S. at 907. In *Leon*, the Court explained:

> Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well generate disrespect for the law and administration of justice.

Id. at 907-08 (internal citations and quotations omitted).

Refusing to apply the good-faith exception to the exclusionary rule in the circumstances of this case would be the type of "indiscriminate application" of the rule that has the potential to foster disrespect for the

criminal justice system among law enforcement and the general public. Police officers on the street must be able to rely on the decisions handed down by the courts to determine what the Fourth Amendment requires of them. When officers act within the confines of the law on the date of the search, only to learn that, notwithstanding this compliance, the rules changed and the defendant will go free, it undermines confidence in the entire criminal justice system. If law enforcement officers act in compliance with the law on the day of the search, those officers should be confident that the evidence recovered will be admissible against the defendant, regardless of any subsequent revision of the law by reviewing courts.

Moreover, while Petitioner claims that, "[i]f the good-faith exception is applied to reliance on overturned law, such a rule would eliminate the mechanism for defense counsel to argue for changes in the law that are necessary for the Supreme Court to set the proper direction of the law[.]" (Petitioner's Brief at 29), in fact, the contrary is likely true. If the Court were to recognize good-faith reliance on settled precedent, courts would be free to change the contours of Fourth Amendment law prospectively. This would achieve the salutary objective of implementing change in law enforcement practices while at the same time avoiding the harmful impact to the administration of justice.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 09-11328

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the exclusionary rule applies to an unconstitutional search on direct review if precedents at the time of the search incorrectly deemed such searches constitutional.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many defendants who have sought suppression of evidence, based upon circumstances similar to those at issue in this case. Thus, the issue presented in this case is of significant importance to our clients, as it will likely control the outcome of pending cases.

SUMMARY OF ARGUMENT

In the decision below, the Eleventh Circuit held that the search of Willie Davis's car violated the rule set forth by this Court in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) and that *Gant* must apply retroactively

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[1]The parties to this case have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amicus curiae*, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief.

to Mr. Davis's case. *United States v. Davis*, 598 F.3d 1259, 1263-64 (11th Cir. 2010). Nevertheless, the lower court held that evidence obtained during the search was immune from suppression under the "good faith" exception to the exclusionary rule because the search predated *Gant* and the Eleventh Circuit's pre-*Gant* case law had approved of the types of searches proscribed by *Gant*. 598 F.3d at 1265-68. The Eleventh Circuit's analysis is unpersuasive because it fails to accurately account for the costs and benefits of applying the exclusionary rule to cases impacted by a "new" Fourth Amendment rule.[2]

As explained in the Brief for Petitioner, there are numerous benefits to applying the exclusionary rule in this context. Pet'r Br. 27-43. One additional benefit is deterring unconstitutional police practices. The Executive had been warned, prior to *Arizona v. Gant*, that a vehicle search incident to the arrest of the vehicle's occupant must be grounded in concerns for officer safety or preservation of evidence. Application of the exclusionary rule in the current context would encourage the Executive, which is responsible for training police officers, to scrupulously honor the Fourth Amendment, even when the law in a particular area is in flux.

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[2]Retroactivity jurisprudence refers to "new" and "old" rules, though new rules are perhaps better understood as newly recognized rules. *See Danforth v. Minnesota*, 552 U.S. 264, 271 (2008).

The exclusionary rule likewise "pays its way" in this context because it is essential to the even-handed development of Fourth Amendment law. The reality of the modern justice system is that the vast majority of cases are resolved by guilty pleas. Defendants wishing to pursue Fourth Amendment claims, novel or otherwise, must pay a substantial cost for seeking vindication of their rights – most obviously by risking an increased sentence due to the withholding of credit under the U.S. Sentencing Guidelines for acceptance of responsibility. Without the potential remedy of suppression, the benefit to the defendant of pursing a novel Fourth Amendment claim will be nonexistent, yet the cost will remain high. Thus, defense arguments seeking to move Fourth Amendment are unlikely to be made, but the government's arguments toward the same end will continue unabated. The inevitable result would be a skewing of Fourth Amendment law in favor of government authority over personal privacy and security.

Due to the limitations that have been set on civil liability for unconstitutional police searches, the exclusionary rule plays a critical role in ensuring that the citizens of this country remain free from unlawful searches and seizures. Because an incentive to advocate for change is critical for a balanced approach to the Fourth Amendment, the exclusionary rule must be applied even when a police search might appear justified by prior precedent.

ARGUMENT

A. Application of the exclusionary rule in the current context would have a deterrent effect on law enforcement.

As explained in the Brief for Petitioner, retroactive application of the exclusionary rule, through the remedy of suppression, is worth its cost because it plays a critical role in the development of Fourth Amendment law. Pet'r Br. 27-43. But this is not the only benefit. Retroactive application of the exclusionary rule also provides substantial deterrence against unconstitutional police conduct.

New constitutional rules rarely, if ever, come as a complete surprise. They are developed over time and are usually preceded by judicial warnings, short of a full-fledged opinion. *See* Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 70 (1965) (new rules are typically "foreshadowed by prior judicial developments"). A warning from this Court that previous understandings of the Fourth Amendment may be in error puts the legal community, including Executive branch officials responsible for training police officers, on notice that an existing law-enforcement practice is risky, and therefore best avoided.

This Court's decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which invalidated the type of search at issue in the case at bar, presents a classic

example of judicial foreshadowing. The Court presaged the rule announced in *Gant* through footnote four and the concurring opinions in *Thornton v. United States*, 541 U.S. 615 (2004). The warning sounded in *Thornton* did not go unheard. After *Thornton*, the legal community was aware that the lower courts' broad interpretations of *New York v. Belton*, 453 U.S. 454 (1981) stood on shaky ground. Defense attorneys began filing claims of error. *See, e.g.*, Petition for Certiorari, *Hrasky v. United States*, 550 U.S. 903 (2007) (No. 06-827); *United States v. Osife*, 398 F.3d 1143 (9th Cir. 2005). Criminal defense organizations conducted seminars, encouraging practitioners to challenge over-expansive *Belton* searches. Law journals and treatises noted that change was afoot. *See* Wayne R. LaFave, 3 Search & Seizure, § 7.1(b) (4th ed. 2004); Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of* Belton *and* Carrol *with an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 Or. L. Rev. 913, 915 (2006); Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines:* Belton *and Its Progeny*, 79 Tul. L. Rev. 365, 395 (2004); G. Paul McCormick, *Supreme Court 2003-2004 Review - Part I*, The Champion 12, 15 (Dec. 2004). Even prosecutors have acknowledged that they knew, as of *Thornton*, that change was at least possible – if not inevitable. *See* Stephen Trinen, Gant *and* Crawford *Update*, Wash. State Bar Ass'n 17th Annual Criminal Justice Institute § 6b at 7 (2010).

While *Thornton* sounded a particularly loud warning bell, *amicus* is not suggesting that police officers are responsible for reading footnotes or concurring opinions in order to predict whether a change in law will render a type of search invalid. This misconceives the notion of deterrence. The exclusionary rule's deterrence rationale has never been premised on the idea that police officers should read case law. The point of the exclusionary rule is to deter constitutional violations committed by the police. That is achieved by influencing prosecutors and other Executive intermediaries who, quite properly, *do* pay attention to evolutions in the law and are expected to train police officers accordingly.

After *Thornton*, and the attention it caused in the legal community, the Executive was on notice that, to the extent that it continued to train officers that vehicle searches were automatically permitted incident to an occupant's arrest, instead of only in light of concerns for safety and preservation of evidence, their conduct could (and likely would) at some point be ruled unlawful. The fact that *Thornton*'s widely recognized warning may not have trickled down to some individual officers should not garner significant sympathy. Law enforcement officers who engaged in expansive *Belton* searches had been operating on thin ice for years. *Gant*, 129 S. Ct. at 1722 (rejecting the idea that police could rely on a rule that permitted them to conduct searches that "were not justified by the reasons underlying the [search incident to arrest] exception"). This is not a circumstance in which

police officers were investigating suspected crimes, only to find themselves stymied by intervening authority that could not have been anticipated. Instead, officers, such as those in *Gant*, were taking the discretion given them by the lower courts and exploiting it to justify the type of generalized, exploratory searches that the Bill of Rights was intended to prohibit. *Gant*, 129 S. Ct. at 1718 & n.3; *Thornton*, 541 U.S. at 625-25 (O'Connor, J., concurring) & 628 (Scalia, J., concurring).

This Court has recognized that the exclusionary rule is a proper means of deterring "systemic error or reckless disregard of constitutional requirements." *Herring v. United States*, 129 S. Ct. 695, 704 (2009). *Compare Illinois v. Krull*, 480 U.S. 340, 351 (1987) (cost-benefit analysis does not warrant application of the exclusionary rule when there is no evidence of a pattern of constitutional violations). The state of affairs prior to *Gant* (and particularly after *Thornton*) is a prime example of such a situation. Thus, application of the exclusionary rule is appropriate under this Court's case law, based upon the traditional concept of deterring unconstitutional police conduct.

Enforcement of the exclusionary rule in the current context would also have the added deterrent effect of emphasizing to the law enforcement community that the last word on whether a constitutional question is settled lies with this Court, not with the lower courts. In the decision below, the Eleventh Circuit claimed that it held the

power to sufficiently settle a Fourth Amendment question so as to warrant good-faith reliance by law enforcement. *United States v. Davis*, 598 F.3d 1259, 1267 n.10 (11th Cir. 2010). But the federal appellate courts are not the only ones involved in deciding constitutional questions – State courts are also charged with this task. A State high court and federal appellate court with overlapping geographical jurisdictions may well disagree on a matter of Fourth Amendment law. Should this occur, the increasingly broad federalization of crimes means police would have an incentive to forum shop their cases to avoid suppression. The incentive to avoid compliance with the Fourth Amendment by seeking refuge in a jurisdiction that does not enforce the exclusionary rule is precisely what this Court had intended to eliminate when it decided *Mapp v. Ohio*, 367 U.S. 643, 657-58 (1961) (applying the exclusionary rule to the states). The law should not move backwards.

B. Retroactive application of the Fourth Amendment, through the remedy of the exclusionary rule, is necessary for even-handed development of the law.

As Petitioner explains, development of Fourth Amendment law requires an adversarial process under which both sides have an equal incentive to advocate for change. Pet'r Br. 9, 31-36. Prior to the adoption of a good-faith exception for new Fourth Amendment rules by some lower courts, including the Eleventh Circuit, the incentives of the

government and the defense were balanced and the law could develop in a reasonably fair way. The government held a clear incentive to advocate for newly permissive interpretations of the Constitution, in that success on the merits would mean orders suppressing evidence would be reversed and convictions reinstated. *See, e.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Robinson*, 414 U.S. 218 (1973). Likewise, the defense had an incentive to argue for newly protective Fourth Amendment rules since, subsequent to *Griffith v. Kentucky*, 479 U.S. 314 (1987), the exclusionary rule would apply to newly recognized rules. *See, e.g.*, *Georgia v. Randolph*, 547 U.S. 103 (2006) (adopting consent-search standard that differed from the standard recognized in the federal courts of appeal); *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008) (order of suppression based upon a *Randolph* violation, even though the search predated *Randolph*).

The good-faith exception adopted by the Eleventh Circuit upsets this balance. Should the circuit court's approach be adopted by this Court, Fourth Amendment jurisprudence will become a one-way ratchet, favoring the government. Without the possibility of a remedy, defendants who would otherwise advocate for newly protective Fourth Amendment rules will have no basis for filing motions, developing factual records, or preserving issues for appeal. Yet the government would still retain an incentive to challenge Fourth Amendment

standards, so as to obtain increasingly permissive rules expanding police power.

Contrary to what some might argue,[3] neither the institutional interests of public defenders, nor those of the defense bar in general, are sufficient by themselves to prompt advancement of new Fourth Amendment claims. Public defenders and appointed counsel owe the same ethical duties to their clients as privately compensated practitioners. *Polk v. Dodson*, 454 U.S. 312, 318 (1981). Whatever interest defense counsel might have in advancing Fourth Amendment law, a client's individual interests must take precedence. The standards of conduct set by the American Bar Association make this point clear:

> The natural desire for personal achievement, or for personal success, or simply to be in the forefront in developing new legal concepts or theories ... never justifies a lawyer compromising his or her professional judgment about a client's best interests. A lawyer's risking his or her client's conviction and a severe sentence in order to make 'new law' or headlines, for example, is never justifiable where a lesser plea can be negotiated.

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[3]*See* Richard H. Fallon, Jr., *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1812 n.448 (1991); Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 Iowa L. Rev. 551, 601-08 (1984).

ABA Standards for Criminal Prosecution Function and Defense Function Third Ed., cmt. to 4-1.2 at 163 (1993).

Without a suppression remedy, a client's interests will almost always run counter to any institutional interest in pursuing a novel Fourth Amendment challenge because Fourth Amendment litigation comes at a cost. As intimated by the above ABA Standard, the primary cost to raising a Fourth Amendment challenge is the loss of favorable plea terms. The modern-day criminal justice system is driven by guilty pleas. *See* U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, fig. C (2009) (over 95% of federal cases result in guilty pleas). In federal court, there is a push to plead, not only to obtain more favorable charges, but also to qualify a defendant for a three-level "acceptance of responsibility" sentencing reduction under the United States Sentencing Guidelines. *See* U.S.S.G. § 3E1.1.[4] Despite the advisory nature of the

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[4] **§ 3E1.1. Acceptance of Responsibility**

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of

Sentencing Guidelines, most federal sentences still fall within the applicable Guidelines range. U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. N (2009). Thus, defendants retain a significant motivation to qualify for acceptance of responsibility.

Under current federal practice, a defendant who pursues a Fourth Amendment claim – novel or otherwise – puts the acceptance of responsibility reduction at risk. It is increasingly common for the government to refuse to file a motion for full acceptance of responsibility, if a defendant files a motion to suppress. *See, e.g., United States v. Drennon*, 516 F.3d 160 (3d Cir. 2008). Because a government motion is required for the last of the three levels of reduction under U.S.S.G. § 3E1.1(b), a defendant who chooses to file a motion in district court automatically risks a higher Guidelines range, should he be convicted.

Taking a Fourth Amendment challenge from district court to the court of appeals comes at an

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his own misconduct by timely notifying the authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

even greater cost. Under the federal rules, a defendant wishing to preserve a pretrial motion for appeal cannot simply plead guilty and thereby salvage at least two of the three acceptance of responsibility points under U.S.S.G. § 3E1.1.[5] A conditional guilty plea, preserving the right to appeal a pretrial motion, requires consent from the government. Fed. R. Crim. P. 11(a)(2). However, consent is unlikely to be forthcoming if the issue a defendant wants to preserve is not potentially case-dispositive. Fed. R. Crim. P. 11(a)(2) Advisory Committee Note (1983 Amendment) (consent should not be granted if an appeal in the defendant's favor will not dispose of the case "by such action as compelling dismissal of the indictment or suppressing essential evidence"); U.S. Dep't of Justice, *Antitrust Grand Jury Practice Manual*, ch. 9(E)(4) (Nov. 1991) (conditional pleas "should be

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[5]The commentary to the Sentencing Guidelines states that a guilty plea is not always necessary to obtain a reduction for acceptance of responsibility. In the "rare situation" where a defendant proceeds to trial for reasons unrelated to factual guilt (*e.g.*, to challenge the constitutionality of a statute), acceptance of responsibility may still be awarded. U.S.S.G. § 3E1.1 comt. n.2. However, it is unlikely that a defendant seeking to litigate a Fourth Amendment claim will fall under this exception since such claims often relate to factual guilt and are not addressed in the Guidelines commentary. Furthermore, unlike a defendant preserving a challenge to a criminal statute, a defendant wishing to preserve a Fourth Amendment challenge cannot submit to a stipulated-facts trial without risking waiver of the Fourth Amendment claim. *United States v. Garcia-Ruiz*, 546 F.3d 716 (5th Cir. 2008) (stipulated-facts trial moots a Fourth Amendment challenge).

entered into only when the issues that are to be appealed will be dispositive of the case"). Furthermore, several federal appellate courts refuse to honor conditional pleas unless the issue preserved for appeal is potentially dispositive. *See United States v. Bundy*, 392 F.3d 641 (4th Cir. 2004); *United States v. Yasak*, 884 F.2d 996, 999 (7th Cir. 1989); *United States v. Wong Ching Hing*, 867 F.2d 754, 758 (2d Cir. 1989).

Given the cost of raising and preserving a Fourth Amendment claim, the absence of the prospect of suppression would simply result in a lack of litigation either at the district or appellate court levels. Without the possibility of suppression, a defense attorney, counseling a client on his best interests, would need to advise against pursuing a Fourth Amendment challenge in the vast majority of cases. The only exception might be a circumstance in which the client has other potentially meritorious claims, apart from a Fourth Amendment challenge. However, in such circumstances, litigation would likely focus on the claims that have the potential to impact the outcome, rather than on the novel Fourth Amendment claims. Without the urgency that accompanies a case-dispositive issue, neither litigants nor courts would be apt to adequately develop such Fourth Amendment claims. Pet'r Br. 34-36.

The disinclination to resolve nondispositive legal issues recently led this Court to eliminate the requirement, in the civil context, that a court first

decide the merits of a contested constitutional issue before ruling on the defense of qualified immunity. *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009). It is precisely because the defense of qualified immunity impairs adequate litigation that this Court has recognized that the incentive offered by the exclusionary rule plays a critical role in the development of new Fourth Amendment claims. *Callahan*, 129 S. Ct. at 822. The reasoning of *Callahan* and the system of qualified immunity that has been developed by this Court would be undermined should there be a good-faith exception to retroactive application of the exclusionary rule.

CONCLUSION

This Court has explained that application of the exclusionary rule in any specific context turns on a cost-benefit analysis. Decades ago, the Court decided that the benefit of retroactive application of new constitutional rules and remedies to all pending cases outweighs the cost. *See, e.g., People v. McCarty*, 229 P.3d 1041, 1044-46 (Colo. 2010) (setting forth history). The outcome should be no different today. Retroactive application of the exclusionary rule to pending cases involving a "new" rule of constitutional procedure is necessary for the reasoned development of Fourth Amendment law

and to deter unconstitutional police practices. The decision of the Eleventh Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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SUPREME COURT OF THE UNITED STATES

WILLIE GENE DAVIS
Petitioner,

vs.

THE UNITED STATES OF AMERICA
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Whether the good-faith exception to the exclusionary rule applies to a search authorized by precedent from the United States Supreme at the time of the search that is subsequently overruled by that Court?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has an interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Summary of the Argument

The exclusionary rule is not a part of the Fourth Amendment, but a judicially created sanction for its violation. Nor is it a remedy for violation of the Fourth Amendment. The purpose of application of the sanction of exclusion is to deter insolent uses of police authority.

A good-faith exception has been applied to police conduct that is reasonable, and therefore would not be deterred by application of an exclusionary sanction, but only in certain circumstances: 1)where a search warrant is obtained, at least where that warrant is not so deficient that even no non-lawyer (a law-enforcement officer) could rely on it; 2)where the police officer's actions are consistent with statute, at least where the statute is not plainly unconstitutional; 3)where the police officer's actions are based on erroneous court records, and 4)where police officer's actions are based on erroneous law-enforcement records, where there has been no culpable negligence.

Police reliance on case authority from this Court is closely analogous to reliance on a statute. It is by definition reasonable, and when that case authority is later overturned no exclusionary sanction should be applied to police conduct occurring before that time. An innocent person filing a federal suit for damages could not collect under principles of qualified immunity, and it is perverse to exclude the truth from a criminal proceeding in precisely the same circumstances.

Argument

The good-faith exception to the exclusionary rule applies to a search authorized by precedent from the United States Supreme Court at the time of the search that is subsequently overruled by that Court.

"The . . . exclusionary sanction [is]. . . a carefully controlled scalpel rather than. . . an indiscriminate blunderbuss. . . ."[1]

A. Belton and Gant

In *New York v Belton*[2] an officer pulled over a speeding car containing four occupants, one of whom was Belton. The officer smelt burned marijuana and saw an envelope marked "Supergold" that he associated with marijuana. The officer got the occupants out of the vehicle, arrested them, separated them at different spots away from the vehicle, and retrieved the envelope, which contained marijuana. He also searched the passenger compartment, found a black leather jacket belonging to Belton, searched it, and found cocaine. Belton moved to suppress the cocaine. This Court found it essential to establish a "single, familiar standard" to guide police officers. Concluding that "no straightforward rule" had arisen from the cases considering search of a vehicle incident the arrest of

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1. *State v. Klingenstein*, 608 A.2d 792, 800 (Md.App.,1992)(Moylan, J.) (aff'd in part, rev'd in part on other grounds, *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532 (Md., 1993)).

2. *New York v Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

an occupant, this Court held that where an officer makes a lawful custodial arrest of an occupant of a vehicle, a contemporaneous search incident that arrest of the passenger compartment of the vehicle, including all containers in that compartment, is permissible, even when the occupant or occupants are no longer in the vehicle[3] (and what officer would execute the search with individuals still remaining *in* the vehicle; the occupants in *Belton* itself had been removed from the vehicle before the search).

In *Arizona v Gant*[4] the arrest was for driving on a suspended license, and the search of the passenger compartment of the vehicle incident the arrest occurred, as in *Belton*, after Gant had been removed from the vehicle, having been placed in the patrol car. Cocaine was found in a jacket in the car. Because *at the time of the search* Gant could not have accessed the jacket, the Arizona found the

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3. "In order to establish the workable rule this category of cases requires, ...we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.. . .Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *New York v. Belton*, 453 U.S. 454, 460-461, 101 S.Ct. 2860, 2864.

4. *Arizona v. Gant*,__US__, 129 S.Ct. 1710 (2009).

search improper, even though at the time of the search in *Belton* Belton could not have accessed the jacket in which the cocaine was found. But rather than applying *Belton* to reverse the Arizona Supreme Court, this Court observed that there had been a "chorus" suggesting that the case be "revisited," did so, and overturned it.[5]

The Court observed that the decision in *Belton* had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[6] The majority went on to note that though it "is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in 'this precise factual scenario ... are legion.'"[7] Rejecting the accepted view as inconsistent with *Chimel v California*,[8] the majority concluded that the rationale of that case authorizes police to search a vehicle incident to a recent occupant's arrest only when the "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"; further, said the Court, "we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is

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5.That *Belton* might be revisited was suggested by Justice Scalia, joined by Justice Ginsburg, in *Thornton v. United States*, 541 U.S. 615, 625, 124 S.Ct. 2127, 2133, 158 L Ed 2d 905 (2004).

6. *Arizona v. Gant*, 129 S.Ct. 1710, 1718.

7. *Arizona v. Gant*, 129 S.Ct. 1710, 1718.

8. *Chimel v California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[9] Four justices dissented on grounds of *stare decisis*, the majority on this point concluding that "We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice."[10] But the majority also said that "Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding."[11] In other words, "*Belton* compliant"/pre-Gant searches afford no right to damage remedies for those whose vehicles were searched, a point to which amicus will return.

B. Post-Gant Decisions

Application by appellate courts of the exclusionary rule to what might be termed "Belton compliant/pre-Gant" police conduct has not been uniform. *Gant* itself did not order the evidence suppressed—the opinion concludes "The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed,"[12] and the State of Arizona raised no exclusionary rule argument before this Court. In the present case the 11th Circuit held that the exclusionary rule should not be applied in these circumstances, and the 10th Circuit has

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9. *Arizona v. Gant*, 129 S.Ct. 1710, 1719.

10. *Arizona v. Gant*, 129 S.Ct. 1710, 1722.

11. *Arizona v. Gant*, 129 S.Ct. 1710, 1723.

12. *Arizona v Gant*, 129 S Ct at 1724.

reached the same conclusion.[13] The Ninth Circuit, on the other hand, has gone the other way.[14] State courts are also divided, but the tendency appears to be in support of the view that where exclusion of evidence serves no deterrent purpose given the non-culpable conduct of the police, it will not be applied.[15]

C. The Issue Here Is *Not* One of Retroactivity But of Application of Exclusionary Sanctions

(1) Retroactivity Principles

There is now a "new rule" concerning searches of the passenger compartments of automobiles incident arrest. The former rule was that a contemporaneous search of the passenger compartment was permissible upon the arrest of any occupant (not only the driver), including the search of any open or closed containers, whether the occupants were removed from the vehicle first or not (and they always would be, as no officer would search the interior of an automobile with people still in it). The new rule is that this search may occur only if 1)the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search (which will virtually never occur, as the Court acknowledged), or 2)it is reasonable to believe

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13. *United States v McCane*, 573 F3d 1037 (CA 10, 2009).

14. *United States v Gonzalez*, 478 F3d 1130 (CA 9, 2010).

15. See e.g. *People v Short*, __Mich App __ (2010 WL 3389252,8-26-2010)(leave granted 2010 WL 4272701); *State v Karson*, 235 P3d 1260 (Kan App., 2010); *State v Dearborn*, 786 NW2d 97 (Wis., 2010); *People v McCarty*, 229 P3d 1041 (Co., 2010).

evidence relevant to the crime of arrest might be found in the vehicle.

The present case was pending on direct appeal at the time of the decision in *Gant*. There is no "retroactivity" dispute involved in this case, now that *Gant* has been decided. New rules, including rules created by the overruling of prior rules (rather than new rules announced in situations of first impression), apply to all cases commenced after the rule is announced, and to those cases pending on appeal on direct review at the time of the announcement of the new rule.[16] *Griffith* means that the substantive Fourth Amendment rule announced in *Gant* is applicable in this case. But it does *not* mean that the exclusionary rule is applicable here, as it is not part and parcel of the Fourth Amendment, nor, thus, of *Gant*; indeed to apply the sanction of exclusion to *Belton* compliant/pre-*Gant* conduct is wholly inconsistent with the principles underlying the exclusionary rule. The rule is not a remedy to the defendant (who could not gain one in a civil suit brought based on the police conduct in this case, as this Court in *Gant* so said, given that pre-*Gant* conduct consistent with *Belton* is by definition reasonable), but a *sanction* to deter an insolent use of power by the police. It is inescapable that no deterrent purpose is served by excluding reliable evidence in these circumstances; to exclude the truth in a criminal case under these facts simply inflicts gratuitous harm on the public interest, and fosters

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16. "Under *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), a 'new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review ..., with no exception for cases in which the new rule constitutes a 'clear break' with the past.'" *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 1549 (1997).

disrespect for the law among police officers, as well as by the public.

(2) Administration of Exclusionary Sanctions

That the exclusionary rule is a sanction to deter future police error and not a remedy to the accused has been long established. The most recent explanation by this Court of the circumstances calling for its application is instructive here:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and *sufficiently culpable that such deterrence is worth the price paid by the justice system*. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[17]

When the police conduct is consistent with the then extant pronouncements of this Court, it can hardly be said that the conduct is "sufficiently culpable"—indeed, culpable in *any* sense—so as to trigger the price paid by the justice system when exclusion of evidence occurs.

Illinois v. Krull[18] presents an analogous situation. There the rule of police conduct was supplied not by the nation's highest Court but by the

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17. See *Herring v. United States*, __US__, 129 S.Ct. 695, 702 (2009) (emphasis supplied).

18. *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987).

legislature. State statute permitted warrantless administrative searches of dealers of used automobile parts, but the statute was held unconstitutional as vesting too much discretion in the investigating officers as to who, when, and how long to search. But the search in question had been effectuated in good-faith reliance on the statute. In language strikingly appropriate for the situation here, this Court held that exclusion was inappropriate:

> As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced."[19]
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> * * *
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> . . .because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." . . .
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> * * *
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> The approach used in *Leon* is equally applicable to the present case. *The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when*

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19. *Illinois v. Krull*, 107 S.Ct. 1165-1166.

> *an officer acts in objectively reasonable reliance on a warrant.* Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it before such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon*: *"Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."*[20]

The logic of the situation is even *stronger* when that which the police have faithfully followed is not a statute but a decision of this Court. Paraphrasing *Krull*, "an officer cannot be expected to question the judgment of the United States Supreme Court which created the constitutional rule followed. If the decision is subsequently declared by that Court to be mistaken, and the rule altered, excluding evidence obtained pursuant to it before such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility by following the rule established by the nation's highest Court. Penalizing the officer for the Court's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." That exclusion of evidence in this circumstance can have no deterrent

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20. *Illinois v. Krull*, 480 U.S. 340, 348-350, 107 S.Ct. 1160, 1166 - 1167 (emphasis supplied).

effect on police officers is inescapable. Only if the exclusion of the truth in a criminal proceeding serves some purpose *other* than deterring culpable police error can exclusion in the present case be justified, but this Court has said time and again that deterrence of the insolent use of police power is that which justifies the exclusionary rule, which is not itself required by the constitution.

D. The Exclusionary Rule and Overruling Decisions

The good-faith exception to the exclusionary rule applies only to certain categories of police conduct: 1)where that conduct—a search—is commanded by a warrant, a judicial order, unless that order is so obviously bereft of merit that even one not a lawyer (a law enforcement officer) should so recognize[21]; 2)where that conduct is authorized by statute, unless that statute is "clearly unconstitutional"[22]; 3)where that conduct is undertaken in reliance on court documents or records[23]; and 4)where that conduct is undertaken in reliance on law-enforcement records that are

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21. As Judge Moylan has put it in his inimitable style, "The actual appearances of such extreme situations, however, are about as rare as the appearances of Halley's Comet." *Ashford v. State*, 807 A.2d 732, 745 (Md.App.,2002).

22. And the actual appearance of such a situation will likely be even more rare than the appearances of Halley's Comet.

23. *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

erroneous, in the absence of reckless or systematic negligence.[24]

There exists no free standing "reasonable police conduct" good-faith exception. One learned commentator says that "Under the traditional good-faith standard, applying the good-faith exception requires asking whether a reasonable officer would recognize the search or seizure as unconstitutional."[25] But this is not accurate (though the author may simply be referring to reasonableness within the recognized categories of good-faith exception, and not as a free standing good-faith standard, for outside of the categories mentioned above the reasonableness of the officer's belief that his or her conduct was constitutional is wholly irrelevant in the exclusionary-rule context). And indeed, in a multitude of these situations where an innocent person (or even a guilty one, who could also sue) cannot obtain a remedy – damages – for the police conduct, exclusion of the evidence follows nonetheless as a matter of course. For example, if an officer arrests absent probable cause and evidence is discovered in a proper search incident that arrest, the evidence will be excluded upon a finding of a lack of probable cause, with the "good faith" of the officer

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24. *Herring*, supra.

25. Kerr, "Good Faith, New Law, and The Scope of the Exclusionary Rule," 99 Georgetown L. J. (forthcoming 2011), p. 45. And the question here concerning "Belton compliant/pre-Gant" police conduct is not one of "new law," as in the resolution of some open question (such as this Court's decision on thermal imaging in *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)), but "changed law," where existing precedent is overruled (Professor Kerr's article discusses "changing law" in the text).

being wholly irrelevant. But in a lawsuit based on those same facts, that officer would be entitled to a finding of qualified immunity and summary judgment—and thus the party suffering the constitutional wrong would receive no "remedy" for that violation—if the trial court found that the officer's mistake was "reasonable"; that is, that though probable cause was lacking, probable cause was "arguable," and so the mistake thus reasonable.[26] In a criminal case a finding that probable cause was lacking but the mistake "reasonable" because there is "arguable" probable cause results in suppression of any seized evidence incident the arrest. And this is true of all police conduct outside of that described above.[27] This seems a decidedly odd state of affairs.

Professor Kerr argues that the exclusionary rule should be applied to police conduct that relies on governing precedent from this Court at the time of the police conduct that is later overruled (so long as the case is on direct review), though admitting that the sanction of exclusion can have no deterrent effect

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26. "To receive qualified immunity, an officer need not have actual probable cause, but only 'arguable' probable cause." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1257 (CA 11, 2010).

27. For example, decisions on exigent circumstances for warrantless entries to avoid the destruction or loss of evidence, on emergency circumstances for "community caretaking" entries, on reasonable suspicion for stops, and many others, all result in exclusion if mistaken, no matter if that same conduct would result in a summary judgment on the basis of qualified immunity because the mistake was reasonable. But if the mistake is reasonable, exclusion of evidence cannot deter it, and suppression of the truth in the criminal proceeding inflicts gratuitous harm on the interests of justice.

on the police, because application of the sanction of exclusion will have a deterrent effect on the "other actors" in the criminal justice system; namely, legislatures and courts, particularly appellate courts (and, one must assume, *this* Court is to be deterred from reaching erroneous criminal procedure decisions—at least ones that do not favor the accused—by application of the exclusionary rule to police conduct that relied on that decision before it was overruled). And it is his position that this Court "has consistently recognized that measuring the effect of the exclusionary rule looks to more than just deterrence of the officer on the street: It must consider how the exclusionary rule deters all the different participants in the system in all three branches of government."[28]

Kerr substantially overreads *Krull* and *United States v Leon*,[29] amicus submits. While this Court in *Leon* did carve out from the good-faith exception for warrants those warrants so deficient that even no reasonable non-lawyer could rely on them (those Judge Moylan refers to as "more rare than appearances of Halley's comet"), and did seem also to carve out from the good-faith exception recognized in *Krull* statutes of criminal procedure that are "clearly unconstitutional" (likely rarer than the "exception to the exception" of *Leon*), in the end the Court was not concerned with deterring magistrates nor with deterring legislatures even with these exceptions to the good-faith exception, but was still focused on the good faith of the officer in those contexts. As the Court said in *Krull*, "We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. . . . Thus, legislators, like

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28. Kerr, p. 9.

29. *United States v Leon*, 468 U.S. 897, 907-908, n. 6, 104 S.Ct 3405, 82 L.Ed.2d 677 (1984).

judicial officers, are not the focus of the rule."[30] That this Court continued on to say that even if the effect on legislators of an exclusionary sanction applied to police conduct relying on a statute were to be considered, there would be no basis for its application, does not detract from this Court's statement that "legislators, like judicial officers, are not the focus of the rule." The notion that appellate courts would be deterred from making erroneous criminal procedure rulings disfavorable to criminal defendants if an exclusionary sanction were to be applied to police conduct occurring before an overruling of that erroneous precedent seems extremely fanciful. And to adapt that which this Court said with regard to legislators in *Krull* to appellate courts,

> The role of appellate courts is to decide cases, and in deciding them to say what the law is. In order to fulfill this responsibility, appellate judges' deliberations of necessity are significantly different from the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' And before assuming office, appellate judges take an oath to support the Federal Constitution. The next inquiry necessitated by *Leon* is whether exclusion of evidence seized pursuant to existing precedent subsequently overruled will 'have a significant deterrent effect' on appellate judges. There is no reason to believe that applying the exclusionary rule will have such an effect. Appellate courts declare

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30. *Krull*, 107 S Ct at 1167.

> what the law is in order to decide cases, not for the purpose of procuring evidence in particular criminal investigations. Thus, it is logical to assume that the greatest deterrent to an erroneous statement of what the law is is the power of higher courts to overturn these decisions, and for ultimate courts of review to reconsider their own decisions. There is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the governing precedent before its overruling will act as a significant, additional deterrent on appellate courts.

At bottom, the argument for applying an exclusionary sanction to police conduct that cannot be deterred by its application—that is, to police conduct consistent with existing precedent at the time that is later overruled—is that it is necessary to the development of Fourth Amendment law to give an incentive to criminal defendants to attack existing precedent, even though exclusion of the truth in the particular criminal proceeding serves no deterrent purpose at all. This Court has never expressed a view that the exclusionary rule has such a purpose. And if a "development of the law" purpose for exclusion is recognized, then, as it serves no deterrent purpose, and exacts a societal cost when evidence is excluded and cases, oftentimes serious violent felonies, are left unprosecutable, the damage to society should be limited as much as possible.

The bestowing of an unmerited benefit on one is not a penalty to others who do not receive that unmerited favor. Professor Kerr suggests the possibility of a "first-come, only" application of the exclusionary rule to police conduct consistent with

existent precedent which is then overruled,[31] which he views as superior in a cost-benefit analysis to the other alternatives (i.e. evidence is excluded in every such case, or evidence is excluded in no such cases), though that one defendant would gain exclusion despite the lack of any deterrent effect. The stumbling block, as he sees it, is that this rule would seem to re-assert the retroactivity jurisprudence that has been discarded. But not in a case such as the present one,[32] where the issue is exclusion of evidence (not all constitutional rules of criminal procedure go to the search for and seizure of evidence) as the result of that which is an undeniably new rule, given the overruling of existing precedent. This Court in this case need not consider the application of the exclusionary rule to cases involving "new law" where an *unsettled* question is decided, and it thus cannot be said that there was law-enforcement reliance on existing precedent (again, thermal imaging presents an example). Though police conduct in at least some of these situations may be completely reasonable, at present exclusion is the result if the "new rule" holds that police conduct to violate the constitution. That principle is not at issue in this case.[33]

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31. Kerr, at 53.

32. And again, the State of Arizona raised no exclusionary rule argument in *Gant*.

33. Amicus submits that at some point a reconsideration of the exclusionary rule so as to allow a good-faith exception for *all* circumstances where the police conduct is not subject to censure under the tenets outlined in *Herring*—is not "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence"—is in order, and there is no time like the present.

In the end, then, when a police officer follows the dictates of a statute concerning searches that is later found to violate the Fourth Amendment, no exclusion of evidence will result from that conduct despite the Fourth Amendment violation because the exclusion of evidence is a sanction not a remedy, and the officer has done nothing sanctionable by following the statute. If an officer executes the order of a court—a search warrant—then if that warrant is found to be constitutionally deficient as to probable cause so that the search violated the Fourth Amendment, no exclusion of evidence will result from that Fourth Amendment violation, unless the warrant is so woefully deficient that no reasonable officer could have relied on it, because the exclusion of evidence is a sanction not a remedy, and the officer has done nothing sanctionable by executing the order of the court. And if an officer carries out a search consistent with principles announced by our nation's highest Court—this Court—and the Court later determines that it was mistaken in its view of the Fourth Amendment, that officer will not be subject to civil damages—though the plaintiff in the suit suffered a Fourth Amendment wrong—because the officer's conduct was by definition reasonable given that the officer simply followed the law not as provided by statute, nor ordered by a court in a search warrant, but as announced by the ultimate Court of the nation.

Again, is it not perverse in this latter situation to impose a *sanction* on the officer—and to inflict gratuitous harm on the public—when the officer has faithfully carried out his duties as consistently with the pronouncements of the Supreme Court regarding the Fourth Amendment as the officer did in *Krull* with the pronouncements of the legislature through statute? Exclusion makes no sense in this case.

Conclusion

WHEREFORE, this Court should affirm the 11th Circuit Court of Appeals.

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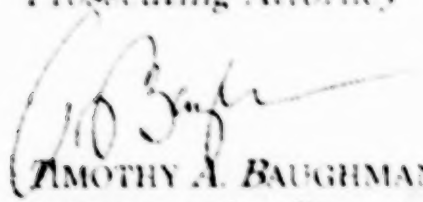

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